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COMSTOCKERY IN AMERICA

Patterns of Censorship and Control

By Robert W. Haney

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Dedicated

to

MY PARENTS

who taught me, among many other things,
the value of independent thinking;

to

EDWIN W. WHITMARSH

who directed that thinking in the study
of history;

and to

JAMES LUTHER ADAMS

who guided me in the application of
independent thought and the historical
method to the problems of censorship,
and without whose encouragement this book
would not have been written.

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SATURDAY REVIEW for "It's Still Murder; What Parents Still Don't Know about Comic Books" by Fredric Wertham, April 9, 1955.

WILLIAM L. WHITE for "To an Anxious Friend," *The Emporia Gazette,* July 27, 1922.

Contents

Preface

Tennyson once wrote, "I love those large, still books." He would not like the physical characteristics of this one, for neither is it impressively large nor does it have a restful hush about it. Its subject matter, however, is immensely important for contemporary American society: the restraints that have been placed by public authorities or private organizations upon the production and distribution of hardcover books, magazines, comics, paperbound books, motion pictures, radio broadcasts, and television programs.

It will doubtless appear to some that these pages are a reply to Father Harold C. Gardiner's *Catholic Viewpoint on Censorship.* This is correct, but only in part. The present volume is not merely a polemic; it is designed also to introduce the reader to censorship and control as they have existed throughout the ages, and thus to incite him to think more deeply and comprehensively about social norms, the meaning of art in all its forms, and the place of the questioning mind in human society. Some readers may wish to consider the relation of all three of these problems to the essential nature of freedom and religion.

With such perspectives and purposes, this book is inevitably controversial. As is well known, and as we shall again have cause to note, controversy is eschewed by our society. To call something controversial is immediately to endanger its existence. There are many reasons for this situation, but one of the simplest is that controversy strains human relations. It is so much more comfortable to talk with people who agree with you about everything, who are, in effect, reflections of yourself. When controversy arises, human relationships must sink deeper roots if they are to survive. This involves considerable courage and effort; we find it easier to avoid the problem from the start.

A society which consciously adopts such a line of least resistance qualifies for Samuel Taylor Coleridge's descriptive

phrase: "Blessed Society! Fitliest depictured by some sun-scorched waste." The fear of controversy is as dangerous as it is naïve. It presupposes a basic social immaturity, arising from an unwillingness to accept a pluralistic world in which there are as many opinions as there are men and women. For my part, I have no intention of attacking an opinion or policy unless I believe there is compelling reason to do so, and I have directed no criticism toward particular individuals, professions, or groups as such. I may disagree with what some of them stand for, but I hold many of them in the highest regard.

Chapter I. Taking Liberties with Liberty

> "Lord love you, sir," he added, "they're so fond of Liberty in this part of the globe, that they buy her and sell her and carry her to market with 'em. They've such a passion for Liberty, that they can't help taking liberties with her."
>
> Charles Dickens, *Martin Chuzzlewit*

Within the last hundred years, we Americans have developed various methods—crude and precise, official and unofficial, obvious and surreptitious—for controlling what is read, seen, and said. A few of these methods can be justified because of the nature of the media involved; this is true, for example, of some of the restrictions imposed upon the radio and television industries because of the limited number of frequencies available to broadcasters.

Those who defend the great majority of restrictions have been forced to take refuge in theories of national defense, in claims of religious inviolability, in arguments in behalf of prudence, or in pleas for the preservation of morals. The arguments and counter-arguments based on political expediency and theology are very familiar; here we shall be concerned only with the arguments in behalf of prudence and the preservation of morals. These arguments are usually associated with *cultural* censorship—that is, the imposition of restrictions upon literary, dramatic, and artistic works, rather than upon the expression of political or religious ideas. Thus cultural censorship lies at the focus of our attention, whether it is exercised by political, religious, or other groups.

This division of the forms of censorship may seem easy and logical, but in practice it faces difficulties. There are occasions when it is impossible to say that a curtailment of free speech or free press falls clearly within one of these categories. For example,

in 1954 Emily Davie prepared a book called *Profile of America,* a tastefully selected and edited collection of documents, pictures, and articles describing various facets of American life. American history received considerable attention, and each event, noble or ignominious, was handled with candor and sensitivity. Trial copies of the book were sent to the libraries of the United States Information Agency and were so well received that the USIA ordered 300,000 more—the largest order ever placed for a single book. However, the House Subcommittee on Appropriations refused to provide the necessary funds, since (1) it was afraid that a picture of a little red schoolhouse built in the eighteenth century would be mistaken by foreign readers for a typical American school building, even though a modern high school and several universities were also pictured; (2) it objected to the mention of Thoreau's *Walden* and O'Neill's *Ah, Wilderness!* since the former is "damaging" and the latter "obscene"; and (3) it deemed the picture of a rural schoolteacher unsuitable because someone had seen a prettier teacher in a book emanating from the Soviet Union. While the Senate restored the cut made by the House, *Profile of America* was bargained away in conference.[1]

At the American National Exhibition in Moscow during the summer of 1959, the American government was faced with the problem of whether it should allow paintings by artists who had been associated with allegedly Communist organizations to be displayed. Afraid of creating an American version of the Pasternak scandal, the government moved to add paintings from the classic American repertoire, including works by Copley, Sargent, Stuart, and Remington. The controversial works were submerged rather than censored. The political aspect of the additions was thereafter ignored, and the controversy came to be treated as a dispute between "traditionalists" and "modernists."

[1] See Emily Davie, "'Profile' and the Congressional Censors," *The Saturday Review,* Nov. 5, 1955. At least one author has felt obliged to try to withhold his own work from sale in a nation whose government was hostile to the United States. For the story of Erskine Caldwell's problem with Nazi Germany, see "Erskine Caldwell at Work, a Conversation with Carvel Collins," *Atlantic Monthly,* July, 1958, p. 26.

A third example of the blurred lines between political and cultural censorship occurred in Alabama. State authorities there, extra-sensitive to anything remotely connected with race relations, removed from the Public Library Service Division, which supplies volumes to local libraries, a children's book accused of fostering integration. The book, Garth Williams' *The Rabbits' Wedding,* dealt with the marriage of two rabbits, one black and the other white.

The lines between religious censorship and the cultural and political varieties are equally hazy. The Church can exert its authority in doctrinal matters for political, prudential, or moral reasons. Thus an executive of the Southern Baptist Convention's Home Mission Board stopped the sale and circulation of Mrs. Phyllis Sapp's *The Long Bridge,* a Baptist study book about the work of the Home Mission Board among Negroes, because he was afraid that the book dealt with too controversial a subject and would provoke discussion. Earlier, *The Long Bridge* had been criticized because it spoke of some of the very pleasant experiences of a Baptist official among Negroes and because it applauded a speech favoring integration.[2]

Yet the overlapping of political, religious, and cultural censorship is, fortunately for our study, sufficiently rare to allow us to maintain the distinctions and to concentrate upon cultural censorship, based upon a moral or prudential rationale. Political and religious censorship will be examined only when they are pertinent: the first cases of censorship, for example, were largely political, but they set the pattern for all later ones in the cultural realm.

The words "censor" and "censorship" are slippery: people think they know exactly what the words mean, but their definitions are generally biased and often intemperate. So frequently have "censor" and "censorship" been used of late, and so loosely have they been applied, that a movement has begun to restrict

[2] See "We Have a Long Span to Travel," *The Christian Century,* Feb. 26, 1958, p. 245, and Phyllis Woodruff Sapp, "It Happened to One Book," *The Christian Century,* Apr. 9, 1958, pp. 432-33.

their application. This movement, as we shall see, is fully justified.

The first persons to receive the specific name of "censor" were two Roman magistrates who took a census of the citizens, estimated their property, imposed taxes in proportion to it, and sought to protect and uphold public manners and morals. In *The Laws* Cicero describes the duties of the censors in his ideal state. He uses as a basis for this formulation the actual duties of the censors set forth in the Roman constitution. Cicero declares:

> Censors shall make a list of the citizens, recording their ages, families, and slaves and other property. They shall have charge of the temples, streets, and aqueducts within the city, and of the public treasury and the revenues. They shall make a division of the citizens into tribes, and other divisions according to wealth, age, and rank. They shall enrol the recruits for the cavalry and infantry; they shall prohibit celibacy; they shall regulate the morals of the people; they shall allow no one guilty of dishonourable conduct to remain in the Senate. They shall be two in number, and shall hold office for five years. The other magistrates shall hold office for one year. The office of censor shall never be vacant.[3]

Republican Rome was devoted to virtue, and virtue was understood as those qualities that make a man responsible, honest, and brave in meeting the obligations of citizenship. Since virtue was what the state needed and demanded, the state assumed the right to punish those who failed to acquire or maintain it. The censors fulfilled their social responsibilities, however, only after offensive materials, behavior, or people had for a time been enjoying considerable freedom in Rome.

While Great Britain followed the Roman example by burning books *after* publication, she also developed another form of censorship. The first secular censorship decree provided for the licensing of books prior to publication. In 1538, Henry VIII issued a proclamation "for expellinge and auoydinge the occasion

[3] Cicero, "The Laws," in *De Re Publica, De Legibus,* trans. Clinton W. Keyes (Loeb Classical Library, 1928), III:III.7, p. 465.

of errours and seditiouse opinions" and established a system for licensing all books printed in English. The decree was retained by his successors, who sought ways to make licensing even more effective. Some of the suggested improvements were adopted in 1586 by the Star Chamber, a judicial subcommittee of the King's Council, whose disregard of the procedures of the Common Law rendered it infamous in British history. The Star Chamber's decree restricted all printing to Oxford and Cambridge universities and to the city of London; it also ordered all manuscripts to be read before publication by the Archbishop of Canterbury, the Bishop of London, and the Lord Chief Justice.

Close attention was not always paid to the censorship laws, and from time to time the British government found it necessary to enact new ones. Political fluctuations also necessitated changes in the law. The Long Parliament abolished the Star Chamber, put an end to royal censorship, and voted to require all books to be licensed before publication by censors of its own choosing. (It was against this law that John Milton wrote his famous *Areopagitica* in 1644.) In 1662 the First Parliament of Charles II established censorship of the press "for preventing the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulating of printing and printing-presses."

Thus two major types of censorship have existed. In Rome, censorship was imposed after the objectionable materials or practices had entered into society. In Britain, however, censorship also took place *before* they gained social currency. Of course, insofar as the Roman type of censorship led people to refrain from actions in anticipation of the censor's disapproval, it too became a form of prior censorship. But this was only indirect: a man was free to act and pay the penalty. In most cases, for all practical purposes, the line between the Roman and the British types of censorship is clear.

As the words "censor" and "censorship" have been popularly used, their original connections with governmental restraints have been forgotten; they are generally applied to attempts to

restrict freedom by both legal and extra-legal means. This situation has led to considerable confusion and needless acrimony. A leading Roman Catholic writer on the subject, Father Harold C. Gardiner, S.J., has attempted to eliminate the semantic problem by making a very helpful distinction. In his definitive volume, *Catholic Viewpoint on Censorship,* Gardiner writes, "A censor is primarily one who not only disagrees with something (or someone) but who is able to enforce that disagreement through some channel of authority." [4] Thus *censorship* is practiced only by someone, or some group, possessing the authority to back its judgment with legal sanctions or physical compulsion. *Control* is practiced by those who lack such authority but use persuasion or pressure to restrict freedom of speech or of the press.

This distinction between censorship and control is valuable and will be adopted here.[5] Hereafter, the words "censor" and "censorship" will refer only to the legal restriction of books, magazines, motion pictures, etc.; the words "controller" and "control" will refer only to extra-legal restraints. The words "comstock" (as a general term) and "comstockery" will refer to both censorship and control. These words are, as we shall see, highly appropriate—though their connotations are, of course, unpleasant.

Whether we are speaking of censorship or of control, a distinction must be made between restraint and editorial preference. If a publishing firm refuses to accept a book or an article, it is not practicing censorship or control—nor is the art gallery that refuses to hang a painting, nor the television producer who turns down a script. The rejected writer or artist is free to try elsewhere and has a chance to obtain more favorable results. Censorship *is* operating, however, when a book is banned from the mails or a motion picture is barred from all theaters. Control *is* being exercised when a private organization is able to exclude a magazine from all newsstands or when portions of a motion

[4] Harold C. Gardiner, *Catholic Viewpoint on Censorship* (Garden City, Hanover House, 1958), p. 10.

[5] For the favorable reaction to it of a former chairman of the American Civil Liberties Union's committee on academic freedom, see James M. O'Neill's "Sense about Censorship," *The Catholic World,* July, 1958.

picture are removed before release, at the advice or demand of a particular group, in order to avoid hostile criticism.

Censorship, then, is (1) the imposition of legal restraints upon the production, publication, sale, or distribution of any book, pamphlet, magazine, newspaper, photograph, or art object, in order to make it unavailable to most people; (2) the imposition of such restraints upon the production or performance of any public entertainment, including plays, motion pictures, radio broadcasts, or television programs, save for such restraints as may be necessary for the physical safety of the audience (fire laws, etc.); and (3) a threat to impose any of the above restraints. Control is identical, except that it is not enforced by legal means. Obviously, these are very broad definitions. When we analyze the current practices of censorship and control, it will become clear that, unfortunately, a comprehensive definition is necessary.

It may be thought unusual that censorship of any kind exists in a democracy in time of peace. More than one hundred years ago, Alexis de Tocqueville made a theoretical observation which Americans have tended to accept as a factual description of our freedoms of speech and of the press:

> In the countries in which the doctrine of the sovereignty of the people ostensibly prevails, the censorship of the press is not only dangerous, but it is absurd. When the right of every citizen to cooperate in the government of society is acknowledged, every citizen must be presumed to possess the power of discriminating between the different opinions of his contemporaries, and of appreciating the different facts from which inferences may be drawn.[6]

When we read of state censorship in other countries, we are likely to feel just a little smug.[7] This smugness, however, is quite

[6] Alexis de Tocqueville, *Democracy in America* (London, Oxford, 1946), part I:10, p. 118.

[7] See the predicament in which the Soviet Union placed itself because of Dudinstev's *Not by Bread Alone,* reported in John Gunther, *Inside Russia Today* (New York, Harper, 1958), pp. 287-89. A still more absurd and sinister situation developed because of Boris Pasternak's *Doctor Zhivago,*

fragile. One of the first major events in our history as a republic was the passage of the oppressive and partisan Sedition Act, which threatened with fine and imprisonment anyone who should "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States." [8] If we have rejected the Sedition Act, we have done so only to replace it with other restrictions often more effective in their applications. The Italian economist and sociologist Vilfredo Pareto has observed:

In olden times the requirement of uniformity asserted itself in certain regards; nowadays it asserts itself in certain other regards, but the requirement is still there. Requirement of uniformity as regards Christian beliefs has diminished everywhere, and in some countries it has virtually disappeared, whereas in economic, social, and humanitarian matters the requirement of uniformity has been growing progressively stronger to the point of absolute intolerance. . . . The Inquisitors of the Catholic faith diligently inquired into offences against their holy religion. Our present-day teetotallers and sex-reformers no less diligently inquire into offences against the holy religion of abstinence from wine and women. And if the effects of these respective inquisitions are different, that is due first of all to the fact that our times are in general less severe in their punishments for all crimes; and secondly to the fact

which was partially responsible for his being awarded the Nobel Prize. The acclaim given *Doctor Zhivago* in the West led the Soviet government to denounce bitterly both the book and its author. See D. Zaslavsky, "Reactionary Propaganda's Clamor over a Literary Weed," *Pravda,* Oct. 26, 1958, reprinted in *The Current Digest of the Soviet Press,* Nov. 5, 1958; see also "A Man Alone," Manchester *Guardian Weekly,* Nov. 6, 1958, p. 1, and Mojmir Soukup, "Pasternak and the Cold War," *The New Republic,* Dec. 8, 1958, pp. 17-19.

To cite but two more examples, the censorship of Spain is notorious. And across the Pyrenees, the French government has been rigidly suppressing all publications which allege the gross maltreatment of Algerian prisoners. In 1958 the *cause célèbre* was Henri Alleg's *The Question;* in 1959 it was an anthology called *La Gangrène.* See Peter Sand, "Censorship in Modern Spain," *Nieman Reports,* Oct., 1958, pp. 22-27; Henri Alleg, *The Question* (New York, Braziller, 1958), pp. 13-36; and Roland N. Murdock, " 'La Gangrène': the Hitler Heritage in Paris," *The Nation,* July 18, 1959, pp. 23-27.

[8] Quoted by Edward P. Cheyney, "Freedom and Restraint: a Short History," *The Annals of the American Academy of Political and Social Science,* Nov., 1938, p. 5.

that if our modern inquisitors are not all lacking in the will, they are lacking, to an extent at least, in the power to wreak their will. On the other hand modern policing is more efficient than policing in the old days, and repression has therefore gained in extension what it has lost in intensity, so that the sum of the sufferings inflicted in this way upon mankind still remains very considerable.[9]

Censors have been busily at work in all generations and among all peoples. Even the prophet Jeremiah encountered censorship in 603 B.C., when the book which he had dictated to Baruch was mutilated and burned by King Jehoiakim (Jer. 36:1-26). And it is to certain European followers of Jehoiakim that we owe some of the clearest statements in favor of censorship. Indeed, censorship has rallied to its support many of the finest minds of the ages.

In *The Republic* Plato asks, "Shall we just carelessly allow children to hear any casual tales which may be devised by casual persons, and to receive into their minds ideas for the most part the very opposite of those which we should wish them to have when they are grown up?" Receiving the expected answer, he concludes:

Then the first thing will be to establish a censorship of the writers of fiction, and let the censors receive any tale of fiction which is good, and reject the bad; and we will desire mothers and nurses to tell their children the authorised ones only. Let them fashion the mind with such tales, even more fondly than they mould the body with their hands; but most of those which are now in use must be discarded.[10]

Plato developed this viewpoint as a result of his desire to establish the ideal organic society, patterned along the lines dictated by pure philosophic "truth." Another theorist, Thomas

[9] Vilfredo Pareto, *The Mind and Society* (New York, Harcourt, Brace, 1935), III:1715, pp. 1166-67.

[10] Plato, "The Republic," *Dialogues of Plato* (New York, Pocket Books, 1950), bk. II, pp. 254-55. A more metaphysical foundation for censorship is set forth in bk. X, pp. 371 ff.

Hobbes, was forced to the same conclusions by his desire to maintain the power of his ideal absolute monarch and to prevent disputes and rebellions:

It is annexed to the Soveraignty, to be Judge of what Opinions and Doctrines are averse, and what conducing to Peace; and consequently, on what occasions, how farre, and what men are to be trusted withall, in speaking to Multitudes of people; and who shall examine the Doctrines of all bookes before they be published. For the Actions of men proceed from their Opinions; and in the well governing of Opinions, consisteth the well governing of mens Actions, in order to their Peace and Concord. And though in matter of Doctrine, nothing ought to be regarded but the Truth; yet this is not repugnant to regulating of the same by Peace. For Doctrine repugnant to Peace, can no more be True, than Peace and Concord can be against the Law of Nature.[11]

Of these two attempts to justify governmental censorship, the Platonic has probably been more frequently used. Human beings are more likely to think that they are custodians of truth, which should be protected against the inroads of error, than they are to be concerned with mere political tranquillity.

A third theorist has provided what is, in all likelihood, a still more popular concept of the role of censorship in human affairs. Michel de Montaigne, while combining a strong dose of Plato with some of the concern for social order which Hobbes was to champion a century later, has a strong paternalistic bias that has become familiar in British and American conservatism:

Our mind is a wayward, dangerous, and undiscerning tool; it is hard to apply any order or measure to it. And, in my time, those who are endowed with some excellence that distinguishes them from the rest, or with some extraordinary liveliness of mind, are almost always marked by unbridled licentiousness in thought and behaviour. It is a miracle to find one of them that is sober and amenable to society. There is reason for confining the human mind within the strictest possible limits. In study, as in everything else, we ought to count and regulate its steps, and the limits of its hunt must be artificially bounded. It is

[11] Thomas Hobbes, *Leviathan* (New York, Dutton, n.d.), II:XVIII, pp. 148-49.

curbed and fettered by religions, laws, customs, sciences, precepts, mortal and immortal penalties and rewards; and yet we see that by its volatile and soluble nature it escapes from all these bonds. It is a shadowy body which has nothing by which one may take hold of it and manipulate it; a variable and shapeless body, on which neither knot nor hold may be fastened. Truly, there are few souls so orderly, so strong, and so well endowed that they can be trusted with their own conduct, and that are able, with moderation and without recklessness, to sail in the liberty of their own judgments beyond the region of common ideas. It is more expedient to put them under tutelage.

The mind is a redoubtable blade, even to its possessor, if he knows not how to arm himself with it fitly and judiciously. And there is not a beast whom it is more suitable to supply with blinkers to control his sight and keep it in front of his feet, and to keep it from wandering hither and yon out of the paths which usage and the laws trace for him.[12]

Lord Hugh Cecil has claimed that this paternalistic outlook is natural for man.[13] Whatever else may be said in favor of the theory, it is certain that Lord Cecil's contentions are supported by the appeals of censors throughout history to what is "good" or "fitting" for a particular segment of their societies. Nor are adults the only exponents of paternalism. According to a recent survey of the opinions of teen-agers, 49 per cent of those tested believe that many people are incapable of deciding for themselves what is good and bad for them; 34 per cent, with 13 per cent uncertain, believe that the government should be allowed to prohibit some people from making speeches; and 60 per cent believe that the police or other groups should be empowered to ban or censor books and motion pictures in their localities.[14] These findings are a clear warning of future dangers to American civil liberties.

No dynamic society remains for a long time under the power of comstockery or totally freed from it. There is a law of action

[12] Michel de Montaigne, *Essays*, trans. Jacob Zeitlin (New York, Knopf, 1935), II:12, p. 222.

[13] See Lord Hugh Cecil, *Conservatism* (New York, Holt, 1912), pp. 13 ff.

[14] H. H. Remmers and D. H. Radler, *The American Teenager* (Indianapolis, Bobbs-Merrill, 1957), pp. 210, 214, 216, *et passim*.

and reaction in the decline and resurgence of censorship and control. Whenever liberty is in the ascendant, a social group will begin to resist it; and when the reverse is true, a similar resistance in favor of liberty will occur.[15] Censors and controllers will always be with us, either potentially or in fact; and the artist, as Dicaeopolis learned from painful experience, will always face the danger of being "bemiryslushified" by these protectors of the public's manners and morals.[16]

Cultural creativity must always be ready to stand up and fight for its existence. Societies all too frequently equate the good with the familiar, and attribute to what is new both an evil parentage and a vicious intent. In our own time this process is particularly noticeable, and the situation is made all the more disturbing by the fact that so few protesting voices can now be heard. Discussions of censorship and control begin to sound like those discussions of "Americanism" that are so integral a part of veterans' conventions: there is general agreement about its necessity and goodness, and disagreement only about minor expressions or applications. Such an approach to comstockery can be as stifling for creativity as a refusal to discuss it at all.

Cultural health requires careful examination of those fundamental presuppositions which create and nourish censorship and control. To the degree that we refuse to examine these presuppositions, we are making it exceedingly difficult for cultural growth to occur.

[15] See Pitirim A. Sorokin, *Society, Culture, and Personality: Their Structure and Dynamics* (New York, Harper, 1947), p. 477.

[16] Aristophanes, *The Acharnians,* trans. B. B. Rogers (Loeb Classical Library, 1924), I:1.382, p. 41.

Chapter II. Blushes and Leers as Guides to Crime

O, forfend it God,
That, in a Christian climate, souls refined
Should show so heinous, black, obscene a deed!
William Shakespeare, *Richard II,* IV:1

Shakespeare's Bishop of Carlisle would seem to be lamenting the presence in England of a shocking book, describing and illustrating the most abhorrent activities conceivable by man. Perhaps it is a tale of a debased, withered old witch who boiled five hundred sweet, innocent children in a caldron in order to feed the legions of bats who shared her shadowy abode. Perhaps some gruesome new method of torturing human beings has been discovered, and the author has thoughtfully provided hauntingly repulsive, full-page woodcuts to show the reader how he can test the new discovery for himself by combining his talents as a carpenter with those of an appropriate victim. It seems more likely than not that the Bishop's book is a lurid tale smuggled across the Channel from France.

Unfortunately, Shakespeare deprives us of the pleasure of speculating on what is so obscene, for we are informed that what the Bishop is actually speaking about is the horrible idea of a subject's judging his king! Such, at one time, was an activity to which the adjective "obscene" could be attached. Since Shakespeare's epoch the word has been limited almost exclusively to nonpolitical uses. It has, in the process, become more vague.

The word "obscene" comes from the Latin *obscenus,* which originally meant inauspicious and ill-omened. Later, *obscenus* came to mean filthy, abominable, indecent. In its English usage, "obscene" has the two standard meanings of (1) "offensive to

the senses or to taste or refinement" (disgusting, repulsive, etc.) and (2) "offensive to modesty or decency; expressing or suggesting unchaste or lustful ideas: impure, indecent, lewd." However, "obscene" is not defined by these terms; the word has its true meaning in the undertones and connotations that surround it. And these implicit values vary so widely from person to person that the word can never be clearly defined. Almost everyone agrees that obscene material should not be circulated in society, but there is no consensus—the claims of the Legion of Decency and the National Office for Decent Literature notwithstanding—concerning what is and what is not obscene.

There will be ample opportunity to discuss this problem more fully in a later chapter. For the present, we must keep the elusive quality of the word carefully in mind as we turn briefly to the historical record. No story offers better materials for a study of the varieties of human folly and the intransigence of human pride.

Like the first American Sedition Act, the edict of the Star Chamber issued in 1586 was political in its intention. It was designed to make sure that no statements hostile to the government were circulated in Great Britain. This was also the purpose of the later licensing and censorship laws directed against books and newspapers. In 1695, however, the last Licensing Act expired and was not renewed. This lapse apparently occurred, not from any zeal on the part of the government to advance the cause of freedom of the press, but because the Act was vexatious in its procedures.[1] In any case, it gave printing a great incentive to expand.

Some people expected that this new freedom from prior

[1] Winston S. Churchill, *A History of the English-Speaking Peoples* (New York, Dodd, Mead, 1957), vol. III, p. 168. For a very thorough and illuminating history of censorship in Britain down to the time of the American Revolution, see Frederick Seaton Siebert, *Freedom of the Press in England, 1476-1776* (Urbana, University of Illinois, 1952). For the story of the end of licensing, see Charles R. Gillett, *Burned Books; Neglected Chapters in British History and Literature* (New York, Columbia, 1932), vol. II, pp. 549-58.

restraints would result in a vast outpouring of harsh criticism directed against William III, but they were proved wrong. The new journals and unlicensed books were remarkably reserved. Macaulay attributes this decorum to the renewed literary activities of those men who, being moderate and law-abiding, had been ill-disposed to violate the censorship statutes. The laws had, instead, only evoked the attacks of the naturally lawless and immoderate. Macaulay's analysis of what happened deserves wide circulation:

> Some weak men had imagined that religion and morality stood in need of the protection of the licenser. The event signally proved that they were in error. In truth the censorship had scarcely put any restraint on licentiousness or profaneness. The Paradise Lost had narrowly escaped mutilation: for the Paradise Lost was the work of a man whose politics were hateful to the government. But Etherege's She Would If She Could, Wycherley's Country Wife, Dryden's Translations from the Fourth Book of Lucretius, obtained the Imprimatur without difficulty: for Etherege, Wycherley and Dryden were courtiers. From the day on which the emancipation of our literature was accomplished, the purification of our literature began. That purification was effected, not by the intervention of senates or magistrates, but by the opinion of the great body of educated Englishmen, before whom good and evil were set, and who were left free to make their choice. During a hundred and sixty years the liberty of our press has been constantly becoming more and more entire; and during those hundred and sixty years the restraint imposed on writers by the general feeling of readers has been constantly becoming more and more strict. At length even that class of works in which it was formerly thought that a voluptuous imagination was privileged to disport itself, love songs, comedies, novels, have become more decorous than the sermons of the seventeenth century.[2]

Shortly before the removal of prior restrictions on the press, the foundations were laid for nonpolitical censorship. Obscenity became an offense in the sight of the law. Oddly enough, the first reported case dealing with obscenity as such, dated 1663, deals not with obscene literature or pictures but with the obscene

[2] Thomas Babington Macaulay, *The History of England from the Accession of James II* (New York, Williams, n.d.) vol. IV, ch. xxi, p. 422.

behavior of a ribald poet. Sir Charles Sedley, in an inebriated and nude state, had exhibited himself from a balcony overlooking London's Covent Garden, had hurled bottles of "offensive liquor" at the assembled onlookers, and had indulged himself in blasphemous language. "From this merry prank, perversely enough, was conceived our present obscenity law, with the sparkling figure of Sir Charles its innocent and unwitting progenitor." [3]

The number of applications of the obscenity law in Great Britain was almost negligible. Before 1727 the Common Law did not hold obscene literature subject to indictment. Even after that date, there was generally great freedom for pre-Victorian poets and novelists. In the middle of the nineteenth century, however, all this was changed, for in 1857 the Obscene Publications Act was passed. The House of Lords was disturbed by the legislation, but was reassured by Lord Chief Justice Campbell that "the measure was intended to apply exclusively to works written for the single purpose of corrupting the morals of youth, and of a nature calculated to shock the common feelings of decency in any well-regulated mind." [4]

In 1868, Lord Chief Justice Cockburn applied Campbell's law in such a way that all of Campbell's reassurances became dead letters. In dealing with a pamphlet sensationally entitled *The Confessional Unmasked,* Cockburn declared in *Regina v. Hicklin:*

> The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.[5]

[3] Leo M. Alpert, "Judicial Censorship of Obscene Literature," *Harvard Law Review,* Nov., 1938, p. 41. Earlier there had been a few cases, probably numbering not more than a dozen, involving prosecutions against books and pamphlets containing "lascivious" and "scurrilous" matter. A work by a nephew of John Milton faced such a charge. See Gillett, *op. cit.,* vol. I, pp. 90-93, 263-64.

[4] Quoted by Huntington Cairns, "Freedom of Expression in Literature," *The Annals of the American Academy of Political and Social Science,* Nov., 1938, p. 81.

[5] Quoted, *ibid.*

This guide to determining whether or not a written work is obscene thereafter became the standard for all obscenity decisions in Great Britain and, later, in the United States. It should be noted that the Hicklin rule went far beyond the supposed concern of the original Act with the morals of the young. It made the test of obscenity the effect which the material in question would allegedly have upon those who were predisposed to being influenced by such material. It determined obscenity, in short, by the reactions, not of average people, but of people for whom any obscene matter would acquire great significance.

In the United States, censorship has had an erratic but long history. Several of the colonies, notably Virginia, did not welcome new ideas, but none were so vigorous in their attack upon them as were the inhabitants of Massachusetts Bay. In that tightly knit theocracy, anyone who displayed a unique inclination of the mind was likely to find himself the recipient of an invitation to move. Professor Thomas J. Wertenbaker tells the story of attorney Thomas Lechford, who wrote a book entitled *Of Prophesie* and made the mistake of asking a friend to read it. The friend was incensed by the book's contents and immediately forwarded it to Governor Winthrop, with the strong recommendation that it be burned instead of printed. The book may have achieved neither distinction, but Lechford was made as uncomfortable as possible.[6]

Although no formal censorship laws existed, censorship was practiced wherever someone sufficiently outraged the theocracy. In 1650, William Pynchon's *The Meritorious Price of Our Redemption* was condemned by the Massachusetts General Court (the legislative body), and Boston's executioner was ordered to burn it in the market place. In 1654 the General Court commanded all citizens to surrender to the authorities certain books teaching the beliefs of the Quakers; the books were to be burned. In 1669, before Thomas à Kempis' *Imitation of Christ* could be

[6] Thomas J. Wertenbaker, *The First Americans, 1607-1690* (New York, Macmillan, 1927), pp. 238-39; see also Isabel M. Calder, "Thomas Lechford (fl. 1629-1642)," *Dictionary of American Biography* (New York, Scribner, 1933), vol. XI, p. 87.

reprinted, the General Court had it revised to suit its own tastes. One of the saddest days for the New England clergy occurred in 1686 when Edmund Andros arrived in Boston to take over his duties as royal governor. On that day, the power of the theocracy to control the press was ended.

Great Britain continued to impose restrictions upon freedom of the press in her colonies, even though restraints had been ended in the mother country. But even these restrictions ceased to operate in 1725. Thereafter, there were a number of prosecutions against printers and publishers for seditious libel, the most famous being the case of the New York newspaperman John Peter Zenger.[7] We have already noted that, following the Revolution, the Sedition Act of 1798 imposed severe restraints upon the freedom of citizens of the newly established country. These restraints were ended, however, as soon as Jefferson became President. Political censorship was not to be revived until the two world wars.

Cultural censorship, on the other hand, was just beginning. The first prosecutions of books on the charge of obscenity took place in Pennsylvania (*Commonwealth v. Sharpless,* 1815) and in Massachusetts (*Commonwealth v. Holmes,* 1821). In the latter case, involving a book called *Memoirs of a Woman of Pleasure,* the court decided that obscene libel is a Common Law offense. There were, however, very few prosecutions for obscenity until after the Civil War. In 1842 Congress forbade the importation of obscene books, and in 1865 it declared illegal the mailing of obscene goods within the United States. A complete, comprehensive obscenity law was passed eight years later at the instigation of Anthony Comstock.[8]

Anthony Comstock is surely one of the most colorful and influential figures in the history of censorship. It might be said

[7] See Arthur M. Schlesinger, Sr., *Prelude to Independence, the Newspaper War on Britain, 1764-1776* (New York, Knopf, 1957), pp. 61-65 *et passim.*

[8] Norman St. John-Stevas, *Obscenity and the Law* (London, Secker & Warburg, 1956), p. 160. See also Cairns, *op. cit.,* p. 81; Gillett, *op. cit.,* vol. I, pp. 256-59, and Thomas B. Leary and J. Roger Noall, "Entertainment: Public Pressures and the Law," *Harvard Law Review,* Dec., 1957, p. 347, note 150.

that he was the somber American counterpart of Thomas Bowdler, the British censor of Shakespeare and Gibbon, whose standard was: "If any word or expression is of such a nature that the first impression it excites is an impression of obscenity, that word ought not to be spoken nor written or printed; and if printed, it ought to be erased." [9]

Comstock was born in 1844, when state and federal governments were just beginning to take a few, ineffective steps against obscene literature. He was a deeply religious man with a strong sense of personal sin. His diary is full of cries of despair concerning his depraved nature, as in this passage from 1864:

> Sin, sin. Oh how much peace and happiness is sacrificed on thy altar. Seemed as though Devil had full sway over me today, went right into temptation, and then, Oh such love, Jesus snatched it away out of my reach. How good is he, how sinful am I. . . . O I deplore my sinful weak nature so much. If I could but live without sin, I should be the happiest soul living: but Sin, that foe that is ever lurking, stealing happiness from me. What a day will it be when the roaring Lion shall be bound & his wanderings cease, then will we have rest, the glorious rest free from sin.[10]

Comstock's life was without joy, although it assuredly had its moments of pleasure. He was appalled by what others would call the beauty of the Roman Catholic service of worship, which he deemed mere frivolity. During the Civil War he attended his first Mass and "soon became disgusted. Do not think it right to spend Sunday morn. in such manner. Seemed much like Theater." [11] His philosophy of life was summed up crisply: "I hate this milk and water system. Give me a man who dares to do right and one ready at *all times* to discharge his duty to the community and to God." [12]

[9] Quoted by Richard Hanser, "Shakespeare, Sex . . . and Dr. Bowdler," *The Saturday Review*, Apr. 23, 1955, p. 50.

[10] Quoted by Heywood Broun and Margaret Leech, *Anthony Comstock, Roundsman of the Lord* (New York, Boni, 1927), pp. 55-56.

[11] *Ibid.*, p. 38.

[12] *Ibid.*, p. 69.

Comstock's duty, as he understood it, was to attempt to improve the morals of other people by rendering obscene literature and photographs inaccessible. For years he was the secretary of the New York Society for the Suppression of Vice. He also inspired the founding of the Watch and Ward Society in Boston. Ever on the alert for dangers to public manners and morals, he attacked the dime novels which were so popular in the late nineteenth and early twentieth centuries as "devil-traps for the young." [13] He acquired his greatest fame, however, by prodding Congress into passing what came to be called the Comstock Law, which attempted to provide effective controls over the circulation of obscene materials in the mails. Comstock even had himself appointed a special postal agent in order to aid more directly in the suppression of obscenity. He was able to boast that he had destroyed more than fifty tons of indecent books, 28,425 pounds of plates for the printing of such books, almost four million obscene pictures, and 16,900 negatives for such pictures. He also credited himself with the dubious distinction of having driven fifteen people to suicide.[14]

Margaret Leech has said of him:

> Anthony Comstock was adapted to the folkways of his time and place. Often in the fight against obscenity he stood alone. Always he was in the van. But somewhere behind him an army of Puritans was solidly massed. For this reason, he was feared and hated—because he was so strong. Had his crusade run counter to the *mores* of his people, he would have been a pitiful figure, a martyr to his lonely ideal. But in him people cursed the spirit of enforced righteousness made palpable—fleshly and menacing, with ginger-colored whiskers and a warrant and a Post Office badge. He was the apotheosis, the fine flower of Puritanism.

When D. M. Bennett was tried in New York for the circulation of obscene literature, the assistant district attorney, William P. Fiero, made it clear that Comstock was well supported:

[13] Mary Noel, "Dime Novels," *American Heritage*, Feb., 1956, p. 55.

[14] Alpert, *op. cit.*, p. 57; Mark Van Doren, "Anthony Comstock (1844-1915)," *Dictionary of American Biography* (New York, Scribner, 1930), vol. IV, p. 331.

This case is not entitled "Anthony Comstock against D. M. Bennett"; this case is not entitled "The Society for the Suppression of Vice against D. M. Bennett." Yes, it is. It is the United States against D. M. Bennett, and the United States is one great society for the suppression of vice.[15]

The aggressive pattern which Comstock set was followed by other moral reformers throughout the country, both during his lifetime and after it. Their cry was that of the niece of Don Quixote, who, eyeing the volumes of chivalric lore on her uncle's shelves, declared, "You must not pardon any of them, for they are all to blame. It would be better to toss them out the window into the courtyard, make a heap of them, and then set fire to it; or else you can take them out to the stable yard and make a bonfire there where the smoke will not annoy anyone." [16]

For all his strength, Comstock met his match in a man whom he never knew personally—and probably never wanted to know. In 1905 George Bernard Shaw, erroneously assuming that Comstock had been responsible for the New York Public Library's decision to move the copy of his play *Man and Superman* into its reserved section, lashed out against Comstock with characteristic sarcasm: "Comstockery is the world's standing joke at the expense of the United States. Europe likes to hear of such things. It confirms the deep-seated conviction of the Old World that America is a provincial place, a second-rate country-town civilization after all." [17] Comstock retaliated several weeks later by suggesting to the police that Shaw's play about prostitution, *Mrs. Warren's Profession,* be suppressed. The police followed his advice, but the Court of Special Sessions decided that the play could not be banned.

Comstock's followers were not impressed by Shaw's objections. Adopting the procedures used so successfully by their

[15] Broun and Leech, *op. cit.*, pp. 88-89.

[16] Miguel de Cervantes, *Don Quixote de la Mancha,* trans. Samuel Putnam (New York, Viking, 1949), I:6, p. 52.

[17] Quoted by Morris L. Ernst and Alexander Lindey, *The Censor Marches On* (New York, Doubleday, Doran, 1940), p. 60. See also Broun and Leech, *op. cit.*, pp. 229-36.

hero, they sought out and had prosecuted under existing obscenity statutes a number of significant books. Since Boston and New York were the centers of the book publishing industry, they became the centers of the book banning industry. Before 1933, Arthur Schnitzler's *Reigin,* Theodore Dreiser's *The Genius* and *An American Tragedy,* Sherwood Anderson's *Dark Laughter,* Upton Sinclair's *Oil!,* and James Branch Cabell's *Jurgen* were condemned. All of Trotsky's works, Sinclair Lewis' *Elmer Gantry,* Radclyffe Hall's *The Well of Loneliness,* Aldous Huxley's *Antic Hay,* Ernest Hemingway's *The Sun Also Rises,* and Erich Maria Remarque's *All Quiet on the Western Front* were banned in one or more localities. Even the sale of Bertrand Russell's *What I Believe* was prohibited. The criterion of judgment was usually whether or not sex was discussed in an offensive manner. This was carried to such an extreme that Lenin's *State and Revolution* was seized in Boston in 1927 as *obscene!*

The protectors of the public's morals were, on occasion, more sensitive about their own reputations than they were about obscenity. *The American Mercury* for September, 1925, contained a hostile article about the Rev. J. Frank Chase, a Methodist minister and the secretary of Boston's Watch and Ward Society. Mr. Chase retaliated the following year by banning the April issue because of Herbert Asbury's "Hatrack," a story about a small-town prostitute which Chase found to be "immoral" and "full of filthy and degrading descriptions." The indomitable H. L. Mencken, editor of the magazine, decided to fight this attack and went to Boston to violate the ban. In a dramatic display of showmanship, he sold a copy of the April issue to Mr. Chase on "Brimstone Corner," whereupon Mencken was arrested. He won his case, however, and was also able to secure an injunction restricting the activities of the Watch and Ward Society.

The federal government, meanwhile, through its control of customs and the mails, was actively engaged in censoring literature. Adhering to the spirit of the Comstock Law, it excluded such works as Boccaccio's *Decameron,* Voltaire's *Candide,* and

the complete works of Rabelais. It even succumbed to the complaints of the defeated Mr. Chase and banned the April issue of *The American Mercury* from the mails. Like local censors, however, the federal government was embarrassed from time to time by not having its left hand aware of what its right hand was doing. Thus, while the Post Office Department was lighting its bonfires for the warming of obscene books, those very books were being admitted through customs, and other books banned by customs were allowed to circulate freely through the mails. The power of customs was restricted in 1930 when a new Tariff Act deprived customs officials of their absolute authority; the Act required a jury trial in a federal court whenever a seizure was contested.[18]

The censors who followed Comstock's example were mostly private citizens. They had the support, however, of federal, state, and local governments. Frequently their procedure was to enter a bookstore, buy a book that they deemed obscene, and then call in a policeman who was standing conveniently just outside the door. These censors were a kind of auxiliary police force or special squad in charge of the locality's morals. They depended entirely upon existing statutes for the success of their work. Hence, when the courts began to interpret obscenity laws more rigidly, these citizens received as great a setback as did the official censors.

Legal setbacks, at first infrequent, eventually crushed most of the censors under a landslide. In 1922 the New York Supreme Court decided, in a case involving Théophile Gautier's *Mademoiselle de Maupin,* that classics cannot be judged by the standards used for ordinary books. In a trial that resulted from the banning of Theodore Dreiser's *An American Tragedy* in Boston, only the so-called obscene parts of the book were placed before the court. This led to a change in the state law: after 1930,

[18] For an interesting list of volumes which the censors have not liked, see Anne Lyon Haight, *Banned Books* (New York, Bowker, 1955). Note also Ernst and Lindey, *op. cit.,* ch. i, and Edgar Kemler, *The Irreverent Mr. Mencken* (Boston, Little, Brown, 1950), ch. xiii.

Massachusetts courts could prohibit the public sale, not of any book "containing obscene, indecent language," but only of "a book which is obscene." A book had to be read and judged as a whole.

The Hicklin rule had been adopted by United States courts in 1879, but it was not always regarded as infallible. In 1913, in the United States District Court of Southern New York, Judge Learned Hand expressed a dislike for the rule—a dislike which was later to be echoed by many others. Because the rule had become normative in American law, however, Judge Hand believed that he should follow it:

I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time. . . . I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature. . . .

Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? . . . To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.[19]

[19] *U.S. v. Kennerley*, 209 Fed. 119 (Southern District, New York), quoted by St. John-Stevas, *op. cit.*, p. 161. At this point, a comment by Heywood Broun on Anthony Comstock seems relevant: "Anthony Comstock may have

Twenty years later, Judge Hand's thoughts were embodied in a new rule for obscenity cases.

been entirely correct in his assumption that the division of living creatures into male and female was a vulgar mistake, but a conspiracy of silence about the matter will hardly alter the facts." Broun and Leech, *op. cit.*, p. 274.

Chapter III. From *Ulysses* to *Howl*

> Its [*Ulysses*'] indecency would have appalled Rabelais and frightened Chaucer; but such a book is valuable in a world trying to be sane, trying to save itself by humour or insight from the perversion of honest instincts and from mental confusion. . . .
>
> Henry Seidel Canby, quoted in Haight's *Banned Books*

James Joyce's *Ulysses* presented an interesting problem to the censors. Here is a book which, although dealing with only one day in the lives of a group of people living in Dublin, is more than seven hundred pages long. The book's language is, to say the least, candid. It is also frequently obscure. Tiny tots will not be much attracted to it, and those adults who are interested enough to begin it will need a great deal of perseverance to finish it. Critics agree, however, that the effort, though great, is amply rewarded. Indeed, *Ulysses* ranks as one of the most important books of the twentieth century.

The early installments of it which appeared in *The Little Review* were burned by the Post Office Department in 1918. Four years later, five hundred imported copies of the complete book were burned, and a court decided that it could not be published in this country. In 1930 a copy sent to Random House was again seized as obscene. Three years later the Treasury Department held up delivery of a copy to Alexander Lindey, who thereupon petitioned that *Ulysses* be admitted to this country for non-commercial purposes as a classic. The Treasury Department complied. Morris L. Ernst next sought to remove the restraints upon the importation of the book for commercial purposes. The results of the ensuing court case were the lifting of the ban

against *Ulysses* and a memorable opinion by U.S. District Court Judge John M. Woolsey.[1]

In this decision, a new rule was adopted for judging obscenity cases, which was in the long run to guarantee that allegedly obscene books would be treated on their own merits. Judge Woolsey declared:

I have read *Ulysses* once in its entirety and I have read those passages of which the Government particularly complains several times. In fact, for many weeks, my spare time has been devoted to the consideration of the decision which my duty would require me to make in this matter. . . .

The reputation of *Ulysses* in the literary world, however, warranted my taking such time as was necessary to enable me to satisfy myself as to the intent with which the book was written, for, of course, in any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called, according to the usual phrase, pornographic,—that is, written for the purpose of exploiting obscenity. . . .

But in *Ulysses,* in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist. I hold, therefore, that it is not pornographic. . . .

The words which are criticized as dirty are old Saxon words known to almost all men and, I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe. In respect of the recurrent emergence of the theme of sex in the minds of his characters, it must always be remembered that his locale was Celtic and his season Spring.

Whether or not one enjoys such a technique as Joyce uses is a matter of taste on which disagreement or argument is futile, but to subject that technique to the standards of some other technique seems to me to be little short of absurd.

Accordingly, I hold that *Ulysses* is a sincere and honest book and I think that the criticisms of it are entirely disposed of by its rationale. . . .

I am . . . only required to determine whether *Ulysses* is obscene within the legal definition of that word.

The meaning of the word *obscene* as legally defined by the Courts is: tending to stir the sex impulses or to lead to sexually impure and lustful thoughts.

[1] See Anne Lyon Haight, *Banned Books* (New York, Bowker, 1955), pp. 87-88.

Whether a particular book would tend to excite such impulses and thoughts must be tested by the Court's opinion as to its effect on a person with average sex instincts—what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the "reasonable man" in the law of torts and "the man learned in the art" on questions of invention in patent law. . . .

It is only with the normal person that the law is concerned. Such a test as I have described, therefore, is the only proper test of obscenity in the case of a book like *Ulysses* which is a sincere and serious attempt to devise a new literary method for the observation and description of mankind.

I am quite aware that owing to some of its scenes *Ulysses* is a rather strong draught to ask some sensitive, though normal, persons to take. But my considered opinion, after long reflection, is that whilst in many places the effect of *Ulysses* on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac.

Ulysses may, therefore, be admitted into the United States.[2]

Judge Woolsey's decision was upheld in the New York Circuit Court of Appeals by Judge Augustus N. Hand, who declared:

While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.[3]

The decisions in the *Ulysses* case may be summarized under five points:

(1) The purpose of the author must be considered. If he tried to exploit obscenity—that is, if his work is pornographic—

[2] Reprinted in James Joyce, *Ulysses* (New York, Random House, 1946), pp. ix-xiv.

[3] Quoted by Haight, *op. cit.*, p. 146.

then his work must be condemned. If, on the other hand, obscene words or situations are only details necessary for the total effect, then his work is absolved from at least one presumption of guilt. It should be noted that the device of defining pornography in terms of the author's intent is a legal mechanism. The conventional definition of "pornography" makes no distinction between intent and effect.

(2) The test of obscenity is the *dominant* effect which a book produces. (The specific phrase "dominant effect" was formulated by Judge Hand.)

(3) This effect must be upon the *average* reader. "It is only with the normal person that the law is concerned," Judge Woolsey declared. The test of obscenity should *not* be the probable effects of the work upon "those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall," as Lord Chief Justice Cockburn had believed.

(4) The literary and artistic merit of a work must be included in the courts' estimate of it.

(5) To ascertain this merit, the testimony of literary critics is admissible as evidence.

The rule in *United States v. "Ulysses"* has been adopted in most federal and state courts. In 1945, however, the Massachusetts Supreme Judicial Court turned its back on Judge Woolsey and banned Lillian Smith's *Strange Fruit,* the story of a love relationship between a white boy and a Negro girl in Georgia. Judge Stanley E. Qua, speaking for the court, cited the Massachusetts law which banned any book, pamphlet, etc. "which is obscene, indecent or impure, or manifestly tends to corrupt the morals of youth." Although disclaiming page-counting, Judge Qua pointed out that obscene episodes occur in *Strange Fruit* "on an average of every fifth page." He thus ignored the contention of Judge Augustus N. Hand in 1934 that the "dominant effect" is the important consideration.

Judge Qua rejected the *Ulysses* decision: "In dealing with such a practical matter as the enforcement of the statute here involved there is no room for the pleasing fancy that sincerity

and art necessarily dispel obscenity." Judge Woolsey's distinction between obscenity and pornography was thereby discarded. The court also excluded the testimony of a teacher of literature and several other authorities. Expanding the implications of the "dominant effect" test, Judge Qua reached the conclusion that "since effect is the test, it follows that a book is to be judged in the light of the customs and habits of thought of the time and place of the alleged offense." He then distorted the logic of Woolsey's standard of *l'homme moyen sensuel:*

A book that adversely affects a substantial proportion of its readers may well be found to lower appreciably the average moral tone of the mass . . . and to fall within the intended prohibition. . . .

Regarding the book as a whole, it is our opinion that a jury of honest and reasonable men could find beyond a reasonable doubt that it contains much that, even in this post-Victorian era, would tend to promote lascivious thoughts and to arouse lustful desire in the minds of substantial numbers of that public into whose hands this book, obviously intended for general sale, is likely to fall. . . .

The statute under which *Strange Fruit* was convicted was largely concerned with "the morals of youth." Hence, Qua had to discuss the problem of who would read the book:

The statute does not make fitness for juvenile reading the test for all literature regardless of its object and of the manner of its distribution. Yet it cannot be supposed that the Legislature intended to give youth less protection than that given to the community as a whole by the general proscription of that which is "obscene, indecent, or impure." [4]

Judge Henry T. Lummus dissented on the grounds that he could find "no erotic allurement" in *Strange Fruit* and that he doubted any young person would pick it up: "They would find it dull reading."

It is interesting to note that Judge Qua and his colleagues were most anxious to put all responsibility for the law in the

[4] *Commonwealth v. Abraham A. Isenstadt,* 318 Mass. 543.

hands of the legislature and to give to the members of that body as much latitude as possible. The result is that the Massachusetts court on this occasion, as on others, appears to have followed the judicial philosophy of United States Supreme Court Justice Felix Frankfurter, two of whose cardinal principles are judicial self-limitation and giving the legislature the benefit of the doubt.[5] It is also interesting to note that Justice Frankfurter has struck down the very type of law which Judge Qua upheld. The principle of judicial restraint is evidently not without its ambiguities.

In the same year, the censorship law of Massachusetts was changed to allow the attorney general to bring an information or a petition in equity against a book which he considers obscene. If the superior court judge believes that there are reasonable grounds for banning the book, he is to issue an order or notice returnable within thirty days asking those concerned with the publication, sale, loan, or distribution of the book to show why it should not be deemed obscene. The burden of proof thus lies with the book and its friends.

The first case under the new Massachusetts law arose in 1948 with regard to Kathleen Winsor's *Forever Amber.* Judge Raymond S. Wilkins supported the superior court judge's ruling that the book is not obscene, noting that "the present scope of review is substantially unlike that which confronted us in *Commonwealth v. Isenstadt,* 318 Mass. 543, 556, where we said, 'The test is not what we ourselves think of the book, but what in our best judgment a trier of the facts might think of it without going beyond the bounds of honesty and reason.' " The court decided, in short, that the new law allows the judges to read the book for themselves. Primary consideration need not be given to the impact of the book on a substantial group of readers. "Unfortunate it is," Judge Wilkins continued, "that sexual episodes abound to the point of tedium. For the most part, however, such episodes are lacking in realistic detail, although some are coarse and in a taste foreshadowed by the advertising. . . . As to the individual characters, the reader is left with an estimate of an unattractive,

[5] See Louis L. Jaffe, "The Judicial Universe of Mr. Justice Frankfurter," *Harvard Law Review,* Jan., 1949.

hedonistic group, whose course of conduct is abhorrent and whose mode of living can be neither emulated nor envied." [6]

Censorship of books in Massachusetts and New York now seems to be rare, but this is not true of the rest of the country. In 1948 the vice squad of the Philadelphia police department descended upon publishers and booksellers and seized a number of books, including William Faulkner's *Sanctuary,* James Farrell's *The Studs Lonigan Trilogy* and *A World I Never Made,* and Erskine Caldwell's *God's Little Acre.* Judge Curtis Bok soon quashed the police department's censorship spree with a remarkable decision:

I hold that s. 524 may not constitutionally be applied to any writing unless it is sexually impure and pornographic. It may then be applied as an exercise of the police power, only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed, as the perceptible result of the publication and distribution of the writing in question: the opinion of anyone that a tendency thereto exists or that such a result is self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt. The criminal law is not in my opinion the "*custos morum* of the king's subjects" as *Regina v. Hicklin* states: it is only the custodian of the peace and good order that free men and women need for the shaping of their common destiny.

Judge Bok went on to say of the Hicklin rule:

Strictly applied, this rule renders any book unsafe, since a moron could pervert to some sexual fantasy to which his mind is open the listings of a seed catalogue. Not even the Bible would be exempt.[7]

Almost all states have obscenity statutes. Several states and many cities and towns have specially designated censorship

[6] *Attorney General v. The Book Named "Forever Amber," and Others,* 323 Mass. 302. See also Bernard DeVoto, "The Easy Chair," *Harper's Magazine,* June, 1955.

[7] Quoted by Norman St. John-Stevas, *Obscenity and the Law* (London, Secker & Warburg, 1956), p. 169, and by John H. Griffin, "Prude and the Lewd," *The Nation,* Nov. 5, 1955, p. 382.

boards, which wield their power with varying degrees of absolutism. In many areas the task of censoring books is left in the hands of the police department. Detroit police banned John H. Griffin's *The Devil Rides Outside* and John O'Hara's *Ten North Frederick,* but the United States Supreme Court came to the authors' aid. The Michigan Penal Code had made it a misdemeanor to sell or to make available any book which contained "obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. . . ." Alfred Butler, Detroit district sales manager for Pocket Books, sold a copy of *The Devil Rides Outside* to a police officer, was convicted of a misdemeanor, and appealed to the United States Supreme Court. Justice Felix Frankfurter, speaking for his unanimous colleagues, declared:

> It is clear on the record that appellant was convicted because Michigan . . . made it an offense for him to make available for the general reading public . . . a book that the trial judge found to have a potentially deleterious influence upon youth. The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. . . .
>
> We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. We are constrained to reverse this conviction.[8]

Two months after this decision, Wayne County Circuit Judge Carl M. Weideman enjoined Detroit police from continuing the ban on O'Hara's book, finding that they had violated the con-

[8] *Butler v. Michigan,* 352 U.S. 380.

stitutional rights guaranteed by the First and Fourteenth Amendments by censoring a book without judicial determination of its legality.[9]

Another interesting case developed in California. Early in 1957 copies of Allen Ginsberg's *Howl and Other Poems* were seized by the United States Customs Bureau. Lawrence Ferlinghetti, the owner of the publishing and retailing firm to which *Howl* was being sent, thereupon printed his own edition, which, of course, could not be touched by Customs. In June, Customs released its volumes, but the San Francisco police then decided to join in the game. Police officers visited bookstores, confiscated all available copies of *Howl,* and arrested Ferlinghetti and his store clerk. The police captain in charge of the Juvenile Bureau hinted that arrests and seizures would be made with regard to other indecent books as well, but he decided to wait and see what the courts had to say about Ginsberg's volume.

Howl and Other Poems is assuredly not the kind of book to make the best seller list or to be chosen by the Book-of-the-Month Club. Its forty-four pages contain an introduction by the noted American poet William Carlos Williams and eleven poems of varying lengths and merit. These poems combine some candid and coarse language and a number of situations which, to say the least, would never be mentioned by Jane Austen. Many passages may be characterized as powerful; but it seems unlikely that *Howl* will, as the publisher claims, be classified as the most significant poem published in America since the Second World War and, perhaps, since T. S. Eliot's *Four Quartets.*

The trial of Ferlinghetti and his employee revolved around the testimony of a number of literary critics, most of whom expressed admiration for the work. The most damaging testimony the prosecution could offer was that *Howl* is "apparently dedicated to a long-dead movement called Dadaism" and that a teacher felt as if she were "going through the gutter" when she read "that stuff." The assistant district attorney prosecuting *Howl* evidently experienced the same reaction:

[9] *Publishers' Weekly,* Apr. 8, 1957, pp. 32-33.

I would like you to ask yourself, Your Honor, in determining whether or not these books are obscene, would you like to see this sort of poetry printed in your local newspaper? Or would you like to have this poetry read to you over the radio as a diet? In other words, Your Honor, how far are we going to license the use of filthy, vulgar, obscene, and disgusting language? How far can we go?

The defense summed up flatly its attitude toward the question of whether or not *Howl* tended to arouse lustful thoughts in the minds of its readers:

You can't think common, rotten things just because you read something in a book unless it is your purpose to read common, rotten things and apply a common, rotten purpose to what you read.

One thinks of Paul's advice to Titus: "To the pure all things are pure, but to the corrupt and unbelieving nothing is pure; their very minds and consciences are corrupted" (1:15; *RSV*).

After taking two weeks to reach a decision, Judge Clayton W. Horn of the San Francisco Municipal Court found for *Howl:*

The people state that it is not necessary to use such words and that others would be more palatable to good taste. The answer is that life is not encased in one formula whereby everyone acts the same or conforms to a particular pattern. . . . Would there be any freedom of press or speech if one must reduce his vocabulary to vapid innocuous euphemism? An author should be real in treating his subject and be allowed to express his thoughts and ideas in his own words.[10]

[10] David Perlman, "How Captain Hanrahan Made 'Howl' a Best-Seller," *The Reporter,* Dec. 12, 1957, pp. 37-39. See also Lawrence Ferlinghetti, "Horn on 'HOWL,'" *Evergreen Review,* vol. I, no. 4, pp. 145-58; "The Red-Eyed Censors," *The Nation,* Apr. 20, 1957, p. 335; *Publishers' Weekly,* July 15, 1957; American Civil Liberties Union, *Nor Speak with Double Tongue,* Annual Report #37, p. 44, and *The Past Is Prologue,* Annual Report #38, p. 14.

Chapter IV. Obscenity: Within or Beyond the Pale?

> The Supreme Court decisions of June 24 are a challenge to all—to those who are for censorship and those who are against it—to desist from acrimonious charges and counter-charges and to deal with the problem of censorship in the light of the common good.
>
> Harold C. Gardiner, "The Supreme Court on Obscenity," *America,* July 13, 1957

On June 24, 1957, three cases involving obscenity statutes were decided by the Supreme Court of the United States. They are of tremendous importance in the history of American censorship. Before 1957, federal courts had been strict in narrowly defining the limits of the censors' powers, while local judges tended to be more tolerant. The Supreme Court may have reversed this, and it appears certain that the Court's willingness to support federal and state censorship will encourage the censors to persevere.

At the time of the *Roth* case, a federal law existed which said, in part:

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and. . . .
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such

mentioned matters, articles, or things may be obtained or made . . . whether sealed or unsealed. . . .

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.[1]

Samuel Roth was a New York publisher and seller of books, magazines, and photographs. It was his custom to advertise his wares by means of promotion circulars mailed to prospective customers. He was found guilty by a jury in the District Court for the Southern District of New York of violating this federal law by mailing obscene circulars and advertising material, and an obscene book. His conviction was affirmed by the Court of Appeals for the Second Circuit, and he appealed to the Supreme Court. Roth's major contention was that his conviction violated the First Amendment ("Congress shall make no law . . . abridging the freedom of speech or of the press").

Roth's case was decided jointly with that of a California mail-order businessman, David S. Alberts. The California Penal Code makes anyone guilty of a misdemeanor who

wilfully and lewdly . . .

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure. . . .

[1] The 85th Congress tightened the law late in the summer of 1958 by enabling the Post Office Department to prosecute violators at the point of delivery of the obscene matter as well as at the point of origin. See *United States Code, Congressional and Administrative News,* 85th Congress, 2nd Session, 1958, vol. I, pp. 1127-28; vol. II, pp. 4012-18.

Alberts was accused of violating this statute and was found guilty by the Municipal Court of the Beverly Hills Judicial District. His conviction was affirmed by a higher California court. Alberts challenged the constitutionality of the above portions of the California Penal Code, claiming that they violated the due process clause of the Fourteenth Amendment ("No State . . . shall . . . deprive any person of life, liberty, or property without due process of law").

Thus, at the core of both the *Alberts* and the *Roth* cases was the question whether "obscenity" is protected by the First and the Fourteenth Amendments.

Speaking for the majority of the Court, Justice William J. Brennan began with a historical note:

> Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.[2]

He then went on to validate this assumption:

> The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services. Thus, profanity and obscenity were related offenses.
>
> In the light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every

[2] *Roth v. United States,* 354, U.S. 476, 481 ff. Joining Brennan in the *Roth* and *Alberts* decisions were Justices Felix Frankfurter, Harold H. Burton, Tom Clark, and Charles E. Whittaker. Chief Justice Earl Warren filed a concurring opinion in each. Justice John Marshall Harlan concurred in *Alberts* but dissented in *Roth.* Justices Hugo L. Black and William O. Douglas dissented in both.

utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois,* 343 U.S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . .

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-572:

". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

We hold that obscenity is not within the area of constitutionally protected speech or press.

It had been argued that the obscenity statutes in question violate the Constitution, since they allow convictions even though there is no proof that overt illegal acts would necessarily result from dissemination of the obscene material. Justice Brennan, quoting from the *Beauharnais* decision, declared that it is unnecessary to show any "clear and present danger" that illegal acts will arise from either libel or obscenity. They stand beyond the pale of constitutional rights.

The Court next commented on the various tests of obscenity, saying that "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest." The Court then added in a footnote:

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. [American Law Institute], Model Penal Code, §207.10(2) (Tent. Draft No. 6, 1957), *viz.*:

". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ."

Justice Brennan was concerned to make sure that the Court was not charged with adopting a puritanical attitude toward sexual matters:

The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

The Court, said Justice Brennan, is always anxious to make sure that matters of public concern are granted free and complete discussion:

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. . . . The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of

speech and press for material which does not treat sex in a manner appealing to prurient interest.

One of the most important passages in the decision dealt specifically with the Hicklin rule:

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. . . . Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

The Court then approved the test of obscenity used by the lower courts: namely, the effect of obscene literature on normal men and women.

Justice Brennan next took up another of the major points made by the attorneys for Roth and Alberts. They had argued that the federal and California laws do not provide "reasonably ascertainable standards of guilt." Hence, it was said, they violate the constitutional requirements of due process. These claims were disposed of in summary fashion:

Many decisions have recognized that these terms [obscene, indecent, etc.] of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . The Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark

". . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ."

Justice Brennan disposed of the remaining items in *Roth* and *Alberts* in two paragraphs. It had been asserted in Roth's behalf that Congress had no power to regulate freedom of speech or of the press; only the states can do so. Hence, Congress cannot use the commerce power, the postal power, or the power to control imports to do what the First Amendment says it may not do.[3] Since the Court had decided that the First Amendment does not prevent Congress from restricting obscene materials, this argument collapsed.

Alberts had asserted that Congress had pre-empted the regulatory field by means of its statute dealing with obscenity in the mails. Hence, said Alberts, the state of California did not have the power to enact an obscenity statute. This argument was easily set aside by Justice Brennan and his colleagues: "The federal statute deals only with actual mailing; it does not eliminate the power of the state to punish 'keeping for sale' or 'advertising' obscene material."

On the same day that the decision was announced in the *Roth* and *Alberts* cases, a verdict was handed down in *Kingsley Books, Inc., v. Brown.* This case involved the prosecution of ingsley Books for making available for sale fourteen allegedly obscene, paper-covered booklets entitled *Nights of Horror.* Section 22-a of the New York Code of Criminal Procedure authorizes the chief executive or legal officer of a community to employ a "limited injunctive remedy" against the sale and distribution of materials which are thought to be obscene. First, an injunction may be sought by a municipal officer against any person or

[3] Brief of Morris L. Ernst, *Amicus Curiae,* filed in the case of *Samuel Roth v. United States of America,* No. 582, in the Supreme Court of the United States, October Term, 1956.

corporation selling what that officer believes to be obscene printed matter. The person or firm is then entitled "to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial." If the primary injunction is granted and, in a final court proceeding, a verdict is handed down against the person or firm, that person or firm must surrender the objectionable materials to the sheriff for destruction. If the verdict goes against the claims of the municipal officer, he cannot be held liable for damages.

Kingsley Books consented to a court's granting an injunction pending further litigation, but did not bring suit against the municipal officer, Brown, as quickly as the law allowed. When the case was finally brought to trial in a lower court, the booklets were found to be "dirt for dirt's sake," and the judge ordered that they be destroyed. "He refused to enjoin 'the sale and distribution of later issues' on the ground that 'to rule against a volume not offered in evidence would . . . impose an unreasonable prior restraint upon freedom of the press.' "[4] Kingsley Books then appealed on the ground that the statute was unconstitutional. This claim was rejected by the New York Court of Appeals, and the case was appealed to the Supreme Court, with Kingsley Books contending that its rights under the due process clause of the Fourteenth Amendment had been violated.

Speaking for four of his colleagues and himself, Justice Felix Frankfurter reiterated the position taken by the Court in the *Alberts* case—that a state may constitutionally convict its citizens of selling or displaying for sale printed materials judged to be obscene.[5] He went on to declare that a criminal proceeding is not the only appropriate means of fighting obscenity, as Kingsley Books had maintained. "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law."

The heart of this case lay in the assertion made by the

[4] *Kingsley Books, Inc., v. Brown,* 354 U.S. 436, 439 ff.

[5] Justices Burton, Clark, Harlan, and Whittaker concurred. Chief Justice Warren and Justices Black, Douglas, and Brennan dissented.

appellants that since the injunction against the sale of *Nights of Horror* was issued before the booklets were found to violate the law, the procedure constituted prior restraint. Prior restraint has been regarded as anathema ever since it was used in Great Britain. Whatever smacks of prior restraint has, therefore, drawn to itself the severest possible criticism.

Justice Frankfurter upheld the New York law:

> Authorization of an injunction . . . during the period within which the issue of obscenity must be promptly tried and adjudicated in an adversary proceeding for which "adequate notice, judicial hearing, [and] fair determination" are assured . . . is a safeguard against frustration of the public interest. . . . It is a brake on the temptation to exploit a filthy business offered by the limited hazards of piecemeal prosecutions, sale by sale, of a publication already condemned as obscene.

Kingsley Books had argued that the New York civil procedure constituted prior restraint, since it prevented the books from being offered for sale. It argued further that only criminal procedures, applied after the sale of a book, were within the state's power. To this contention, Justice Frankfurter replied:

> Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. Until then, he may keep the book for sale and sell it on his own judgment rather than steer "nervously among the treacherous shoals." . . .
>
> Criminal enforcement and the [civil] proceeding under §22-a interfere with a book's solicitation of the public precisely at the same stage. In each situation the law moves after publication; the book need not in either case have yet passed into the hands of the public. . . . In each case the bookseller is put on notice by the complaint that sale of the publication charged with obscenity in the period before trial may subject him to penal consequences. In the one case he may suffer fine and imprisonment for violation of the criminal statute, in the other, for disobedience of the temporary injunction. The bookseller

may of course stand his ground and confidently believe that in any judicial proceeding the book could not be condemned as obscene, but both modes of procedure provide an effective deterrent against distribution prior to adjudication of the book's content—the threat of subsequent penalization.

Justice Frankfurter noted that many state laws contain basically the same procedural safeguards as those of New York's §22-a. He set aside all arguments that provision should be made for a jury trial and went on to deal with the complaint that Kingsley Books had received excessive punishment:

. . . the consequences of a judicial condemnation for obscenity under §22-a [are not] more restrictive of freedom of expression than the result of conviction for a misdemeanor. In *Alberts,* the defendant was fined $500, sentenced to sixty days in prison, and put on probation for two years on condition that he not violate the obscenity statute. Not only was he completely separated from society for two months but he was also seriously restrained from trafficking in all obscene publications for a considerable time. Appellants, on the other hand, were enjoined from displaying for sale or distributing only the particular booklets theretofore published and adjudged to be obscene. Thus, the restraint upon appellants as merchants in obscenity was narrower than that imposed on Alberts.

The Court concluded its decision by denying the claims (1) that the seizure and destruction of the booklets was an excessive punishment and (2) that *Kingsley Books, Inc., v. Brown* should be decided on the basis of *Near v. Minnesota* (283 U.S. 697), wherein the state was forbidden to enjoin the distribution of future issues of a newspaper that it had found politically offensive.

Since *Kingsley Books* deals only with a procedural question, it will be the easiest to discuss. The crux of the Court's decision is that such a form of prior restraint as that allowed by the New York law does not endanger a bookseller's constitutional rights. Prior restraint as such is not unconstitutional.

Justice Brennan's dissent was concerned with the lack of any provision for a jury trial in the New York law. This is a formal

legal question beyond the reach of our discussion here. The role of juries in obscenity cases is most important, however, in view of the *Ulysses* ruling and its amplification in the "dominant effect" test.

Chief Justice Warren was upset by the fact that although the allegedly obscene publication was on trial, the use made of it was ignored. When he concurred in *Roth,* Warren declared:

> The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.[6]

The Chief Justice thus interjected the question of intent, a question which had been considered by Judge Woolsey in the *Ulysses* case and which had been condemned by Judge Qua in *Commonwealth v. Isenstadt.* On the basis of this same consideration, Warren dissented in *Kingsley Books:*

> It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature. To do otherwise is to impose a prior restraint and hence to violate the Constitution. Certainly in the absence of a prior judicial determination of illegal use, books, pictures and other objects of expression should not be destroyed. It savors too much of book burning.[7]

This position is not likely to become very popular, for an obvious reason. The whole basis of obscenity legislation is the presumption that there is such a thing as obscene literature and that the very existence of this literature is a threat to society.

[6] *Roth v. United States,* 354 U.S. 476, 495.
[7] *Kingsley Books, Inc., v. Brown,* 354 U.S. 436, 446.

The particular ways in which obscene books and magazines are used are considered irrelevant, as are the intentions of those who use them. Chief Justice Warren seems to have been drawing a line which would prevent the banning of medical and psychological works because of their handling of sex. In this respect, his attempt is admirably conceived. But when we are dealing with literature that is concerned with sexual matters for literary or other purposes, the question of the specific uses of that literature must be subordinated to the more important problem of the nature of obscenity itself.

Justices Douglas and Black were similarly interested in the particular conditions under which the *Nights of Horror* booklets were distributed. Thus, Justice Douglas declared:

> In New York City the publisher may have been selling his tracts to juveniles, while in Rochester he may have sold to professional people. The nature of the group among whom the tracts are distributed may have an important bearing on the issue of guilt in any obscenity prosecution. Yet the present statute makes one criminal conviction conclusive and authorizes a state-wide decree that subjects the distributor to the contempt power. I think every publication is a separate offense which entitles the accused to a separate trial. Juries or judges may differ in their opinions, community by community, case by case. The publisher is entitled to that leeway under our constitutional system. One is entitled to defend every utterance on its merits and not to suffer today for what he uttered yesterday. Free speech is not to be regulated like diseased cattle and impure butter.[8]

Douglas and Black also pointed to the problem of prior restraint. These justices have been two of the firmest supporters of the inviolability of the First Amendment, and they continued to be such in *Kingsley Books*. Justice Douglas spoke for both men: "Nothing is more devastating to the rights that [the First Amendment] guarantees than the power to restrain publication before even a hearing is held."

The question at the heart of the *Kingsley Books* case is whether New York acted in accordance with the Constitution in

[8] *Ibid.*, p. 447.

allowing its officials to enjoin the sale of a publication before there was any judicial verdict with regard to that publication. No security that the state can offer will compensate for its violation of the freedom of the press. The First Amendment may not be inviolable; but the state's desire to forestall the profitable sale of allegedly obscene books, which might increase after the announcement of prospective court action against them, is surely not a social value more fundamental than the protection of a citizen's constitutional rights.[9]

Let us turn now to some relatively minor aspects of the *Roth* and *Alberts* decisions. The more fundamental issues raised by these decisions will be examined in the following chapter. For now, let us consider the Court's thoughts on the soundness of the word "obscene" and its synonyms as "reasonably ascertainable standards of guilt."

Weston La Barre has noted that "obscenity" is a word and a category that means a number of different things to different people. "The anthropologist discovers no absolutes with respect to the descriptive *content* of the obscene representation or word or act. The customary law, so to speak, is always logically prior to the behavior: nothing is obscene that has not been previously defined culturally as such." [10] To a Chinese gentleman, "The Stars and Stripes Forever" may be disgustingly lascivious. An Arab considered doughnut-dunking an exceedingly lewd practice. The exposure of the face of a Moslem woman was at one time deemed an impure act, and no Eskimo woman can be regarded as virtuous who removes her boots in the presence of strange men.[11]

In this country we have become quite accustomed to marked changes in what is considered obscene, although we seldom pause long enough to think about them. Probably the best example is that of the ladies' fashions at the beach. Not too long ago it was

[9] For a criticism of the opposition to any form of prior restraint, see "Prior Restraint—A Test of Invalidity in Free Speech Cases?" *Columbia Law Review*, Nov., 1949.

[10] Weston La Barre, "Obscenity: An Anthropological Appraisal," *Law and Contemporary Problems*, Autumn, 1955, p. 533.

[11] *Ibid.*, pp. 536-37, 541, *et passim.*

a criminal offense to wear a bathing suit which exposed the knees. In the '20s and '30s, nothing was more objectionable than a book or motion picture which dealt with sex or the processes of birth in a more direct manner than that of a description of the busy life of a bee.[12] "All that we can postulate of the social animal, man, is that he has the *capacity* for repression through socialization or enculturation, and hence can have very intense *reactions* to the prohibited or the obscene as defined by his society—but so far as any 'universality' of descriptive *content* of these categories is concerned, this is wholly the prescription, cultural or legal, of his own social group or subgroup." [13]

Thus, when a law seeks to control obscenity by determining how literature will affect the normal member of the society, it is guessing blindfolded. Patterns of response change rapidly and vary widely from group to group. Within any society that contains a number of different and often incompatible cultural groups, there can be no agreement on what *for that society* is obscene. A judge or jury from one background will be appalled by D. H. Lawrence; others will find Lawrence inoffensive and the Marquis de Sade silly. Vladimir Nabokov's *Lolita* has seemed to some grotesquely rotten; to others it seemed urbane or even profound. Obscenity is all things to all men. As such, it is hardly adequate as a standard of criminal or civil law.

Another important fault of all obscenity statutes is that they ignore the difference between thought and action. Justice Brennan, speaking for the Supreme Court in *Roth,* asserted that since obscenity is not protected by the First Amendment, there is no need to apply Justice Oliver Wendell Holmes' criterion of a "clear and present danger." Brennan's reasoning is sound only if obscenity is beyond the pale. Justice Douglas, who believes that all speech is protected, protested the decision:

> . . . punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred *Dennis* case conceded

[12] See Morris L. Ernst and Alexander Lindey, *The Censor Marches On* (New York, Doubleday, Doran, 1940), ch. III.

[13] La Barre, *op. cit.,* p. 543.

that speech to be punishable must have some relation to action which could be penalized by government. . . . This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, what is the constitutional test of obscenity? [14]

Before we examine the important problems suggested by Douglas' words, let us recapitulate the case against censorship: (1) Prior restraints are not worth the danger they pose to the rights of freedom of speech and of the press. (2) "Obscene" and its synonyms are too vague to serve as standards in criminal and civil prosecutions. (3) The courts have failed to deal with the question of the relationship between allegedly obscene literature and illegal acts.

[14] *Roth v. United States,* 354 U.S. 476, 509.

Chapter V. Obscenity: Freedom or License?

> You tell me that law is above freedom of utterance. And I reply that you can have no wise laws nor free enforcement of wise laws unless there is free expression of the wisdom of the people—and, alas, their folly with it. But if there is freedom, folly will die of its own poison, and the wisdom will survive. That is the history of the race. It is the proof of man's kinship with God. . . .
>
> So, dear friend, put fear out of your heart. This nation will survive, this state will prosper, the orderly business of life will go forward if only men can speak in whatever way given them to utter what their hearts hold—by voice, by posted card, by letter or by press. Reason never has failed men. Only force and repression have made the wrecks in the world.
>
> William Allen White, "To an Anxious Friend,"
> Emporia *Gazette*, July 27, 1922

We have spoken much of the rules which have been used by courts of law to define obscenity, and we have looked briefly at their historical development. In the last chapter, we saw how those rules were applied by the United States Supreme Court in 1957. It is now time for us to question them more closely.

The passing of the Hicklin rule will not be lamented. It was primarily concerned with protecting the young or abnormal mind from being stimulated by antisocial thoughts—or at least by thoughts which the society considered to be dangerous to itself. In the *Ulysses* case, a number of important advances were made over the Hicklin rule, and these advances have been approved by other courts.

The most important question in all obscenity statutes and cases is: what shall be adjudged obscene? Justice Brennan declared in *Roth* that "obscene material is material which deals with sex in a manner appealing to prurient interest." However, since Justice Brennan favorably referred to the American Law Institute's Model Penal Code and its definition of obscenity, we must be careful to avoid the idea that all obscenity is concerned with sex. Nudity and excretion also come under the heading of obscenity when they are dealt with in a manner which appeals to prurient interest. Nevertheless, it is more than likely that sexual obscenity will be the chief target of the censors, the other varieties being much less common in literature.

For all its statements about the mystery and significance of sex, the Court has still, in effect, assumed a puritanical view. By defining obscenity in terms of what is acceptable to community standards, the Court has tacitly approved the notion that prurient thoughts of sex are socially objectionable. Sexual *longings*—that is, emotional attitudes aroused by sexual thoughts—are even more closely related to action, and so are probably even more offensive. But the sexual act itself, provided it occurs within the proper legal conditions, is without reproach. This is unusual logic, and, as Justice Douglas was quick to recognize, it imposes a false norm:

> The tests by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said "music"; 18 said "pictures"; 29 said "dancing"; 40 said "drama"; 95 said "books"; and 218 said "man." [1]

It appears that the law will have to ban men and women in order to stop appeals to "prurient interest."

Justice Douglas, in his book *The Right of the People,* refers once again to the problem of the meaning of obscenity:

[1] *Roth v. United States,* 354 U.S. 476, 509.

The idea of using obscenity to bar thoughts of sex is dangerous. A person without sex thoughts is abnormal. Sex thoughts may induce sex practices that make for better marital relations. Sex thoughts that make love attractive certainly should not be outlawed. If the illicit is included, that should make no constitutional difference. For education concerning the illicit may well stimulate people to seek their experiences in wedlock rather than out of it.

Douglas makes his point even more strongly by quoting from Judge Jerome Frank in *Roth v. Goldman:*

"I think that no sane man thinks socially dangerous the arousing of normal sexual desires. Consequently, if reading obscene books has merely that consequence, Congress, it would seem, can constitutionally no more suppress books than it can prevent the mailing of many other objects, such as perfumes, for example, which notoriously produce that result." [2]

It is appropriate to consider within this context another current and significant definition of obscenity—that of the Roman Catholic Church. This religious organization has taken a strong stand against obscenity. In the process of thinking about it, Catholic leaders have sought to define meticulously what they have opposed. One of the most recent and most careful of these leaders is Father Harold C. Gardiner. What he has written about obscenity is extremely pertinent at this point; it will be even more so when we deal with the controls exercised by non-governmental pressure groups over cultural expression. Father Gardiner declares:

[Roman Catholic] teaching holds, as a basic and cardinal fact, that complete sexual activity and pleasure is licit and moral only in a naturally completed act in valid marriage. All acts which, of their psychological and physical nature, are designed to be preparatory to the complete act, take their licitness and their morality from the com-

[2] William O. Douglas, *The Right of the People* (Garden City, Doubleday, 1958), p. 62.

plete act. If, therefore, they are entirely divorced from the complete act, they are distorted, warped, meaningless, and hence immoral.[3]

He then distinguishes several varieties of sexual pleasure, and concludes:

the actual arousing of genital commotion, or the intrinsic tendency of an object so to arouse . . . must be present if a book, a work of art, etc., can objectively be called obscene.[4]

This understanding of what is to be termed obscene is surely more generous in its origins and more discriminating in its applications than the views of many American Protestants. On this, as on other occasions, the Roman Catholic Church is in the vanguard of liberality in questions of morals. Even so, its understanding of obscenity may still be considered too puritanical and restrictive. It is based on the fundamental Catholic notion that sexual stimulation, when divorced from the marital relationship and from procreation, is a violation of "natural" law. (The Catholic condemnation of birth control by contraceptive devices has the same basis.) This extraordinary view of what is "unnatural" typifies the rigid demands which the Church makes upon the instinctual and intellectual lives of its members.

In a later chapter, we shall have cause to discuss the danger inherent in any attempt to identify natural law with a variable social norm. Here we need only note that the Catholic position serves as a buttress for American anti-sexualism, and that it may offer the main defensive framework of censorship from which future aggressive sorties against obscenity will be launched.

The definition of obscenity offered by Father Gardiner is, none the less, an improvement over existing ones. He has in general avoided the notion that sexual thoughts are objectionable, although some interpreters will doubtless stretch "intrinsic tendency" further than he would wish. His definition points to

[3] Harold C. Gardiner, "Moral Principles Towards a Definition of the Obscene," *Law and Contemporary Problems*, Autumn, 1955, p. 564.

[4] *Ibid.*, p. 567.

the minimal standards we must work to obtain in our legal handling of obscenity, though not the maximal standards for which we may hope. It is not an ideal definition; it is not what many of us would prefer; but at least it is better than preceding ones.

A major complication in the problem of judging obscenity is that, while the Supreme Court's handling of obscenity rules has been treated as clear and decisive—for such it was in the minds of the majority in *Roth* and *Alberts*—this clarity and decisiveness are bogus. Justice Harlan, dissenting in *Roth* and concurring in *Alberts,* has penetrated the superficial consistency of the Court's verdict. In order to do justice to the brilliance of his opinion, we must first note the objections which preceded his analysis of obscenity rules.

One of the main points of his dissent in *Roth* was that Congressional censorship in matters of obscenity is less defensible than censorship by the states:

> Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric.[5]

Conversely, censorship by the states is less objectionable than national censorship imposed by federal authorities:

> The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both . . . the letter and spirit of the First Amendment.[6]

This position is persuasive, and worthy of further consideration by those who advocate federal censorship; but of greater

[5] *Roth v United States,* 354 U.S. 476, 504.
[6] *Ibid.,* p 506.

interest is Justice Harlan's discussion of the Court's procedure in deciding the cases before it:

> The Court seems to assume that "obscenity" is a peculiar *genus* of "speech and press," which is as distinct, recognizable, and classifiable as poison ivy is among other plants.

A similar complaint is, as we have noted, implicit in Chief Justice Warren's opinions in *Roth* and *Kingsley Books,* but Harlan went beyond Warren's position:

> Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards. . . .
>
> In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based.[7]

Thus, Justice Harlan would have had the Supreme Court decide, not merely questions of legal right and procedure, but whether or not the specific materials in the cases at hand were obscene.

Harlan's most significant point, however, is his complaint against the Court's handling of the "prurient interest" test. Speaking of the use of this test by the American Law Institute's Model Penal Code, Tentative Draft No. 6, he declares:

> The bland assurance that this definition is the same as the ones with which we deal [in the federal and California statutes] flies in the face of the authors' express rejection of the "deprave and corrupt" and "sexual thoughts" tests:
>
> "Obscenity [in the Tentative Draft] is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters.

[7] *Ibid.,* pp. 497-98.

We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which 'tends to corrupt or debase.' If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking. . . . On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a forbidden book. . . ."

As this passage makes clear, there is a significant distinction between the definitions used in the prosecutions before us, and the American Law Institute formula. If, therefore, the latter is the correct standard, as my Brother Brennan . . . intimates, then these convictions should surely be reversed. Instead, the Court merely assimilates the various tests into one indiscriminate potpourri." [8]

If the reader is somewhat confused at this point, he is not alone. The legal profession and our censors are in the same state. With the four words "appeal to prurient interest"—the words which the Supreme Court took as its guide and equated with the tests used in the lower courts—we have lost ourselves in a quagmire.

The Court seems to have stressed lustful thoughts and the moral debasement which supposedly accompanies them. The A.L.I., following the tradition of Judge Woolsey, is concerned with the material itself and its effects on its readers. The A.L.I. carefully scrutinizes the readers, yet its standard appears to be drawn with references to the *abnormal* man. The Model Penal Code speaks not of lustful interest in sex but of "morbid" interest; it refers dramatically to those "eager for a forbidden book"; and in advocating its own, narrow definition, it slights the traditional, broader ones.

The A.L.I.'s problems in defining obscenity are instructive as indications of the awkward situations that develop whenever an

[8] *Ibid.*, pp. 499-500.

attempt is made to determine exactly what aspect of obscenity makes it illegal. There are only two possible *publics* for obscenity: the general public, which determines what is "normal," and a specialized public, usually viewed as emotionally deranged or immature. The *effects* of obscenity can be either that it arouses lustful thoughts or that it leads to socially hostile and destructive action.

The A.L.I. seems to have found that normal people in contemporary society tolerate the arousal of a great many lustful thoughts and that there is no indication that these thoughts lead their owners to misbehave. Therefore, if obscenity is to be punishable, it must be defined in the narrower terms of material having a "morbid" fascination for the abnormal or immature individual.

The goals of the A.L.I. are to be appreciated, but the result of its work is that normal people are denied the opportunity to encounter what is inoffensive to them because it is strangely attractive to a social minority.

The literature which thus excites "a shameful or morbid interest" tends to be pornographic rather than obscene. Pornography is a literary genre appealing to a specialized clientele whose interest therein is abnormal. The devotees of pornography seem to be those who, for a number of psycho-social reasons, achieve socially destructive pleasure from "dirt for dirt's sake." Obscenity may represent the warping or stretching of social norms; pornography expresses their utter overthrow and degradation. Obscenity, as traditionally defined, may appeal to many normal people for various reasons; but pornography does not seem to attract, in Judge Woolsey's phrase, the "person with average sex instincts."

Abraham Kaplan has clarified the differences between the obscene and the pornographic by noting three types of obscenity: *conventional obscenity,* the attack upon existing sexual patterns (Zola, Ibsen, Shaw); *Dionysian obscenity,* the exaltation of "excessive" sexuality (Aristophanes, Boccaccio, Rabelais); and the *obscenity of the perverse,* a revolt against accepted standards accompanied by an acceptance of them (Baudelaire). A fourth

category Kaplan calls the *pornography of violence,* a blending of sex and the will to destruction—in short, the devotion to "death in the afternoon" which "prepares for love at midnight." [9]

If it is true that the obscenity provision of the A.L.I.'s Tentative Draft No. 6 applies only to pornography and to the abnormal devotee of it, then the Model Penal Code violates one essential part of Judge Woolsey's wise verdict in *Ulysses.* It forgets the key sentence: "It is only with the normal person that the law is concerned." In suggesting that obscenity laws should be concerned with the abnormal person, the A.L.I. is preparing the way for serious consequences. First of all, the law will ban from all eyes material which attracts the glance of only a minority. More important, the law will presume to effect a remedy which it is incapable of bringing about. The appeal of pornography to the abnormal man or woman will not be ended by the censoring of pornographic materials. Only psychiatric treatment can achieve that. The law can do no more than deprive the abnormal citizen of one source of pleasure—and a relatively harmless one, at that. The result of such legal action will be to force the reader of pornography to seek for satisfaction in other realms, and this may very well lead to overt anti-social acts which are a genuine threat to society.

In sum, by recalling the facts of the A.L.I.'s definition, Justice Harlan threw into confusion the Court's clear emphasis upon the effect of allegedly obscene material on the normal man. It thus became necessary for lower courts to bring order out of the Supreme Court's chaos.

In Chapter VI our attention will be directed toward an examination of the practical applications of recent developments in the law of obscenity. These applications consist of what we would call the minimal standards to be used in obscenity cases.

[9] Abraham Kaplan, "Obscenity as an Esthetic Category," *Law and Contemporary Problems,* Autumn, 1955, pp. 551-58. For an eminently readable and perceptive analysis of the nature of the rebellion against Victorian morality by writers who have been accused of obscenity, see John Henry Raleigh, "Victorian Morals and the Modern Novel," *Partisan Review,* Spring, 1958.

If we *must* have prosecutions against obscenity, they should be circumscribed as narrowly as possible by legal safeguards.

On the other hand, to accept these minimal standards does not mean that we have forgotten the maximal one. This standard is that obscenity—as defined by Justice Brennan, or Father Gardiner, or the American Law Institute—*is* protected by the First Amendment, as applied to the states by the Fourteenth, and that prosecutions on the charge of obscenity are unconstitutional.

This standard is created inevitably by the very nature of censorship itself. We have already summarized three of the reasons: (1) Prior restraints present a far greater qualitative danger to a free society than does any affront to the community's morals by an obscene publication. (2) The terms employed to define the illegal act in obscenity statutes are inadequate. Indeed, it may be impossible to find an objective definition of "obscene" in view of the flux of undertones and connotations that surround the word. (3) The courts have not paid sufficient attention to the relationship between the reading of obscene materials and the performance of illegal acts. Justice Brennan has said that this issue is pointless, since obscenity is not constitutionally protected. Yet even if obscenity did fall outside the guaranties of the Constitution, the courts would have to show that there is a good reason for legislating against it. The notion that obscenity is not protected is irrelevant to whether or not it should be outlawed.

From our discussion in this chapter, three more charges may be adduced against censorship: (4) The Supreme Court's understanding of the "appeal to prurient interest" is chaotic, and the obscurity of the obscenity statutes is therefore unresolved. (5) The Roman Catholic definition of obscenity (as set forth by Father Gardiner), even if it were adopted by the courts, would still be too restrictive of human freedom. (6) The A.L.I.'s test of obscenity, while preferable to the existing rules, focuses the attention of the law on the abnormal citizen, and would deny to all men the literature that might overexcite an unbalanced mind.

Thus, even if censorship were desirable, the task of enforcing it is fraught with obstacles inherent in the material with which the censors must deal and in the remedial measures available to

them. Pragmatically, a judicious, fair, and constructive censorship appears to be impossible. In addition, major philosophical objections must be considered.

There are at work in this country two contradictory theories of the nature of government. One says that a government and its instrument, law, deserve the whole-hearted obedience and respect of its subjects. Father Gardiner even argues that government deserves our love.[10] According to this view, governments are necessary not only for peace among men but also for human virtue and happiness. A good government will foster freedom, but this freedom consists of doing right and not being bound in slavery to evil. The primary task of a government, therefore, is not to protect its subjects, but to lead them in the direction of virtue and truth. Thus, Walter Berns laments:

> What was once the principal purpose of government is now forgotten entirely; the problem of making men virtuous and deserving of freedom is completely ignored. . . . Civil society is possible under a system of absolute suppression of all heretical opinion. We have seen it. Civil society is impossible if every man retains an absolute freedom of opinion. The proper course for government, once we are clear on these extremes, is to follow the advice of ancient wisdom and so educate our citizens that suppression and persecution become unnecessary and, since moral education requires some censorship, to avoid rulers who appoint censors like Herr Goebbels the tyrant and John Winthrop the bigot. . . .
>
> The fact is, freedom is not enough—even Rousseau knew that. Civil society requires mutual trust, and if the community is made up of citizens who trust one another, there can be freedom of speech and opinion. But only if the community is made up predominantly of citizens of *good character* who trust one another, is freedom not only possible but desirable.[11]

This theory of government, which makes a standardized form of virtue the supreme value, is willing to allow all other values to become subservient, and even to justify many un-

[10] Harold C. Gardiner, *Catholic Viewpoint on Censorship* (Garden City, Hanover House, 1958), ch. i.

[11] Walter Berns, *Freedom, Virtue & the First Amendment* (Baton Rouge, Louisiana State University, 1957), pp. 229, 252, 255-56.

virtuous means capable of promoting virtue. For example, one state lawmaker asserted in the New Bedford Delinquency Recess Committee hearing at Fall River, Massachusetts, that he was in favor of a stricter law if it would prevent just one young person from becoming a delinquent, and that he didn't care "whose toes we step on and what civil liberties we limit, including the freedom of the press." [12]

"Virtue" and "social solidarity," however, can easily become the slogans whereby individuals or social classes justify and extend their monopoly of power or their exploitation of segments of the population. "Virtue" and "social solidarity" in the Middle Ages meant that the serf should be obedient and remember the station in life to which he was bound. In the ante-bellum South, the Negro could indeed be virtuous and take his place in the social system, but only by abandoning all hope of freedom and his dignity as a man. Berns is surely advocating neither feudalism nor slavery, but his doctrines offer no safeguard against them.

The second theory of government is that, while government is necessary, it should be strictly limited. It must intervene in the lives of its citizens only when absolutely necessary. Indeed, these citizens have rights which must normally stand above the claims of government. Laws should be enacted to protect these rights and to foster them, but never to abridge them:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

[12] Reported in the New Bedford *Standard-Times*, Nov. 29, 1955, and quoted by Richard McKeon, Robert K. Merton, and Walter Gellhorn, *The Freedom to Read: Perspective and Program* (New York, Bowker, 1957), note on p. 18.

Law, as conceived in the Declaration of Independence, is not a social device to advance the cause of virtue. It is a protective device to insure the freedom and the opportunities that men need for their happiness and their development. Freedom is not the right to be virtuous; it is the right to do as one pleases. This freedom can be limited only when one person's exercise of it endangers the freedom of others, or when it results in overt actions that society deems destructive of its own purposes.

These two views of freedom are not the sole determinants of one's attitude toward censorship.[13] Another factor is one's estimate of human nature in relation to power. A person may believe that censorship is necessary to direct men's footsteps into the pathways of virtue; but at the same time he may believe that no man, when the power to censor is given to him, will censor wisely. On the other hand, a person may believe that all forms of censorship should be abolished and yet feel that the censors can be trusted with their power. Such a man will be less distressed by existing censorship practices. Experience, however, seems to bear out Lord Acton's dictum that "power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority, still more when you superadd the tendency or the certainty of corruption by authority." [14]

Some conservatives would have us create laws that impose virtue—that is, moral excellence—much as the Romans of antiquity sought to impose virtue upon their fellow citizens. This idea seems uncomfortably appropriate today, partly because America has begun to resemble late republican Rome in its international politics. Nevertheless, when contrasted with another form of excellence, the *virtù* of the Italian Renaissance, the luster of the conservatives' ideal is considerably dimmed. They would have us, in effect, orient our legal system around the goal of creating moral men and women as morality is understood in

[13] See *ibid.*, p. 8.

[14] John E. E. D. Acton, *Historical Essays & Studies* (London, Macmillan, 1907), Appendix, p. 504.

mid-twentieth-century America. A more demanding and more fruitful goal is that which, under the banner of *virtù,* calls upon us to develop our human potentialities, to seek not only moral excellence but also esthetic, creative excellence.

While we pay lip service to creativity, it means little to us. We are apt to mumble an encouraging word or two when confronted by independent thinking and original accomplishments, but we are equally apt to distrust them secretly and to wonder if the creative individual who confronts us with his own expressive personality is not a physiological freak. Yet his originality is as vital to our development as human beings as it is to his own growth. The writer, the painter, the musician—all artists who treat common experiences in a new manner, or who probe with skill and insight the hidden recesses of life—are stirring us profoundly, even as they are sharpening their own vision and clarifying their own thoughts. Perhaps this is why we distrust them. They are urging us to work at life as an experience to be relished and glorified, whereas we prefer the secure comfort of a torpid routine, to which we need only conform.

Nothing that exists is inappropriate for study by man. When we limit the writer or anyone else in what he may call to our attention, we are not only restricting his work; we are also narrowing our own perspective. The picture that remains to us is twisted and distorted by our prejudices of what we would like the world to be. When this happens, we are only isolating ourselves further from the real world. The reassurance that censorship is imposed in behalf of virtue can be little consolation: there are obstacles enough to our understanding of our lives without our adding to them, even for high-minded reasons.

When our understanding is one-sided because we are unacquainted with much of reality; when we are afraid of the fundamental nature of man, in ourselves and in others around us; when our work, our emotional attachments, our family life, and the performance of our social duties are all partially empty and numbed by this failure of understanding—when this is the kind of life we have forged for ourselves, then our efforts at ordering our society by censorship have been wasted. We have

not come to terms with man or nature or with anything else. We have merely settled placidly for a tranquilizing routine without depth and with no significant meaning.

Many-sided though it is, censorship possesses the one unifying emotional response of fear—fear of a world which would, if we faced it, threaten us with the task of becoming individual human beings.[15] Our blushes and smirks and self-righteous denunciations of four-letter words, lewd pictures, and all the other paraphernalia of obscenity and pornography are little more than the attempt to feel noble when we are really being absurd. And we pass on through generations this legacy of fear. All the muck and dirt which pornographic literature and photography can pour out into our bookstores or onto our newsstands is trivial beside the real damage to the human soul—the systematic production of frightened and inept men and women which goes under the name of censorship.

[15] For an excellent summary of the mental attitude of the censors, see R. M. MacIver, *The Pursuit of Happiness* (New York, Simon and Schuster, 1955), ch. x, "The Deadly Moralist."

Chapter VI. How Shall We Deal with "Smut"?

> I made no claim of being a literary critic in the professional sense. But I feel I have some sense as to what is decent and what is filthy, as most normal people do have, and filth is filth.
>
> Postmaster General Arthur E. Summerfield, reported in *The Anchor*,[1] July 9, 1959

In any discussion of obscenity, the question arises as to what should be done about the extreme cases—that is, pornography. D. H. Lawrence has defined pornography this way:

> Pornography is the attempt to insult sex, to do dirt on it. This is unpardonable. Take the very lowest instance, the picture postcard sold underhand, by the underworld, in most cities. What I have seen of them have been of an ugliness to make you cry. The insult to the human body, the insult to a vital human relationship! Ugly and cheap they make the human nudity, ugly and degraded they make the sexual act, trivial and cheap and nasty.[2]

Pornography is, to use the common definition, "dirt for dirt's sake." It is a type of communication devoted almost exclusively to arousing sexual hunger by presenting vivid sexual scenes and descriptions. Pornography evokes sexual responses from most normal people. They can, however, take it or leave it; and there seems to be a "saturation point," beyond which the

[1] Publication of the Roman Catholic diocese of Fall River, Mass.

[2] D. H. Lawrence, "Pornography and Obscenity," in his *Selected Literary Criticism* (New York, Viking, 1955), p. 37. See also his *Sex, Literature, and Censorship* (New York, Viking, 1959).

material has increasingly less effect.[3] For some persons, it evidently becomes as necessary as narcotics are for the drug addict. Like the addict, the man or woman who depends upon pornography has lost control of his or her life. Like the addict, such a person is sick.

Pornography seems to have found few friends among those who oppose censorship and who would like to see obscene literature freed from restraints. When a prosecution against a pornographic book is brought to the attention of these men and women, a sizable split in the phalanx suddenly develops, and civil libertarians break into dissident groups.

A number of reasons for drawing a line between obscenity and pornography are usually given. One of the most common is simply that critics of pornography are totally disgusted by it. It brings an almost visceral loathing in them. Among the more rational complaints is the claim that pornography has no social value: being merely "dirt for dirt's sake," it has no right to expect legal protection. A third argument, often presented, is that while the distributors of obscene works are seriously interested in literature, the purveyors of pornography are mercenary parasites trading on the sexual drives of other human beings. The pornographers seem in fact to have no respect for those whom they are seeking to entice, nor are they attempting in any degree to create works of art. They give every appearance of wanting to make money quickly, no matter how they do it. No appeal to their readers is too base or misleading.

Some people set forth possible situations involving pornography which challenge sharply the tolerance of the most vigorous opponents of all cultural censorship. They may ask, for example, whether society should allow an unexpurgated edition of Pepys' *Diary* with photographic illustrations to be distributed among the children in public schools. Should a television station be permitted to produce a dramatization of Mark Twain's obscene story, *1601*? Should Casanova's *Mémoires* be allowed to appear in comic-strip form in Sunday supplements? Ought Henry

[3] See Eberhard and Phyllis Kronhausen's excellent book, *Pornography and the Law* (New York, Ballantine, 1959), p. 263.

Miller's *Tropic of Cancer* to be designated as required reading in college English courses?

These arguments have considerable persuasive power. One must sympathize with the good intentions and the noble values of those who present them. Surely, the business of pornography is a deliberate degradation of one of the most tender and profound experiences of men and women. Pornography itself is vicious because it deprives sex of its human meaning. The meaning of sexual experience lies fundamentally in its being a part of a total relationship between two human beings. Pornography, which denies the involvement of personality in sex, makes of this "great and mysterious motive force" (in Justice Brennan's phrase) something merely biological, merely animal. To present this reflexive response as an ideal experience is to ignore the potentials inherent in the mature human being. Pornography does indeed, as Lawrence declared, "insult sex."

But to agree that pornography is vicious is not to agree that it must be banned. Great is the persuasiveness of the arguments of those who would condemn it, but these arguments merely add new, peripheral elements to the problem of cultural censorship; they do not deal with the fundamental questions. Reactions based on mere visceral loathing are interesting, and we can sympathize with them, but they are irrelevant. Pornography may have no social importance, but important interests are not always social interests. Pornographers may make a business of degrading sex; and some measure of revulsion may result from the idea that, even for the writers and distributors, pornography is a business rather than a means of artistic or erotic expression. But society cannot object because a commercial enterprise subordinates art and emotion to financial profit. All of modern Western society has set that example; the pornographers merely follow it.

As a final argument, those who advocate a degree of censorship warn that pornography, if freed from legal restraint, could engulf our society. Casanova, the Oxford Professor, and other classic figures in pornographic literature could engage in their amorous escapades on every billboard and TV screen, in every comic strip and textbook in America. This is a sobering sug-

gestion; he who opposes all cultural censorship is, indeed, supporting a policy involving considerable risk. Yet the reverse decision cannot be easily reached. If one attempts to separate obscenity from pornography and to condemn the latter, he is setting himself up as an arbiter of what other people may think and feel. To remain neutral is, basically, to be irresponsible. As Pascal said in another context, a choice must be made, but it cannot be made without some misgivings.

Granted the risk and the concomitant misgivings, the dire situations suggested by some opponents of pornography are not adequate justifications for condemning pornography. Some of these situations need never develop. Censorship involves, in effect, legal exclusion from social currency. It is not censorship for local school boards to keep some editions of Pepys' *Diary* out of the grammar schools, so long as the book can be read elsewhere. Society has a right to set limits to involuntary or forced consumption. It has no right to determine what a man, woman, or child may read voluntarily.

At this point we are brought to the core of the problem of pornography—a core which, as we have seen and shall see again, is paralleled in the problem of obscenity. The fundamental question is whether pornography is helpful, harmful, or neutral in its effects. It is in terms of effects alone that pornography can be seriously discussed, yet the relationship between reading and alterations in behavior is very difficult to pinpoint. This is also true, in varying degrees, for television and other media of communication. There simply is not enough scientifically obtained information to support any theoretical analysis of the effects of the mass media. Such evidence as does exist suggests that the effects are far less serious than is popularly supposed.[4]

In any free society, ideas and other less rational stimuli attack the individual continually from all points of view. Even if one source of stimuli (such as books, radio, television, or films) should pour out a consistent set of stimuli, it could not block the

[4] The reader should consult the Kronhausens and the writers mentioned in Chapters VIII and XI who are concerned with the problem of the effects of the mass media upon juveniles.

individual's receptivity to other stimuli—and it could not radically alter his behavior. If all books were pornographic, they still could not corrupt a man, for his family, his friends, his coworkers, his social organizations, his formal education, the stimuli of other media, and all the arts and crafts of his cultural heritage would oppose or dilute the effects of pornographic literature. It is therefore impossible to assert that pornography will automatically elicit from its readers a socially destructive response.

To justify censorship of pornography, one must not rest on the point that internal responses to pornography are inimical to the best interests of society. Socially destructive responses are embedded in the personality of every human being, regardless of social control. Modern disciplines concerned with the human psyche have shown that every normal individual has thoughts and emotions which, were they released, would put social life to a severe test. To single out pornography as inciting these responses is to be a little too selective in one's search for a scapegoat.

Those who advocate a degree of censorship must show that persons who respond to pornography with socially destructive thoughts and feelings *act out their responses in socially destructive deeds.* No society which calls itself free may restrain the mere arousal of thoughts and feelings. If it can be shown that arousal leads to acts which society feels constrained to punish, then pornography may be justly considered harmful. Until then, there is no reason to believe that censorship is in any way defensible.

But censorship of pornography and obscenity is now the law, and to expect the Supreme Court to free such writings from all restraints would be absurdly naïve. The Court is not likely to favor a degree of social flexibility which American history up to the present condemns. Idealists may insist that the function of the judiciary, in view of the pre-eminent importance of freedom of speech and of the press, is to oppose the abridgment of these freedoms. In fact, the idea of the pre-eminent importance of the First Amendment has never met with much favor in judicial

circles. Instead, the Court limits its own responsibility with two theses: (1) that it does not set standards for the nation, but is merely the custodian of the community's morals, and (2) that it must give to legislative bodies as much leeway as possible in conserving those morals.

There is very little likelihood that the Court will alter its position in the near future. The most that can be expected is that the Court's attitude in specific cases will shift a little as "contemporary community standards" shift. Hence, it will be the function of the remainder of this chapter to outline the issues that the Court must now consider in deciding whether a specific book shall be banned.

Let us use as an example a book which has in fact been accused of being obscene: the third version of D. H. Lawrence's *Lady Chatterley's Lover.* Let us examine it from the standpoints of the censor, the censor's opponent, and the judge who has had to reach a final decision.

The plot of *Lady Chatterley* revolves around the married life of Clifford and Constance Chatterley. As a result of wounds suffered in the First World War, Sir Clifford is both crippled and impotent. Wanting an heir to the family estate, he suggests to his wife that, if she should bear another man's child, he would accept that child as his own. After a minor affair with one of her husband's friends, Lady Chatterley meets Mellors, the family gamekeeper, and completely surrenders herself in her love for him. By the end of the book, Lady Chatterley has left her husband; the reader is led to expect that she and Mellors will overcome the obstacles which prevent their finding happiness together. In the course of the book, Lawrence is exceedingly frank in his treatment of sexual relations. In addition, he has little hesitation in using well-known but seldom printed four-letter Anglo-Saxon words.[5]

[5] An excellent account of the book's history and literary background is Mark Schorer's "On Lady Chatterley's Lover," *The Griffin,* Apr., 1959. This is also printed in the first unexpurgated American edition, issued by the Grove Press in 1959.

The typical censor has found much in *Lady Chatterley* to outrage him. Accustomed to more polite language, he has been distressed by the vulgar language of Lawrence's characters. Indeed, there are times when Lawrence may seem to go out of his way to revert to Anglo-Saxonisms. The censor has also been highly offended by Lawrence's glorification of sex. Devoted to a rigid understanding of the Ten Commandments, and thoroughly satisfied with the norms of New England puritanism and the American middle class, the censor has viewed Lawrence's sexuality, his doting upon the human body, as dangerous to the stability of American morality. He has found it difficult to imagine that a sane, healthy-minded man could ever write such a book, or that sane, healthy-minded people could bring themselves to read it. He is certain that any decent person who works his way through *Lady Chatterley* will feel much the worse for his experience. One such reader—the Rev. Dr. Daniel A. Poling, editor of *The Christian Herald*—commented that the novel had "dirtied my mind." [6]

The reaction of a man who is not censorial has been quite different. Reading *Lady Chatterley* carefully, he discovered that the passages which may be a little upsetting even to him are inherently necessary to the book's total effect—an effect which is certainly not obscene. By themselves the passages might be thought offensive; in the context of the book they acquire a great beauty. The book is concerned, he has found, with tenderness in all its forms between a man and a woman. (Indeed, Lawrence originally thought of using *Tenderness* as the title.) To limit the book's treatment of this theme would be to cripple what the novelist seeks to exalt. Such a limitation would make *Lady Chatterley,* as Lawrence envisioned it, impossible.

This reader has been forced to the conclusion that the censor is not aware of the book as a whole, but has his attention alerted only for "filth." Indeed, the story in its expurgated form was allowed to circulate freely: it is not the story that is found offensive, but the way in which Lawrence chose to tell it. For his part, this reader agrees with Cardinal Newman that we cannot expect liter-

[6] Quoted in the New York *Times*, Sunday, July 26, 1959, p. 47.

ature to depict men as saints. "I say, from the nature of the case, if Literature is to be made a study of human nature, you cannot have a Christian Literature. It is a contradiction in terms to attempt a sinless Literature of sinful man." [7] If this is so, to ban *Lady Chatterley* on the charge of obscenity is to put a strait jacket on art and to hide from human beings who and what they are.

The procedures by which the process of censorship begins differ greatly. Perhaps the Post Office Department is called in to bar the book from the mails. Or the censor may arrange to buy a copy in a bookstore, whereupon a policeman will arrest the bookseller for trafficking in obscenity. The very offering for sale of the book may violate the law and allow the police to confiscate the book. Or an injunction may be sought against the bookseller, with some guarantee of a quick trial of the issues. Whatever method the censor chooses, his opponent must obtain legal aid immediately and counter the censor's every move.

The case is thus brought before a court within a particular legal context. That context determines some of the procedural issues to which both the plaintiff and the defendant must address themselves in presenting their cases, and it may determine what principles must guide the judge in reaching his decision.[8] Rather than trace these details of the *Lady Chatterley* case, let us concentrate on the essential issues.

Regarding the reputation of the book, a judge must ask: (1) *Is the book a classic?* Ever since the New York Supreme Court decided (in the case of *Mademoiselle de Maupin*) that a classic cannot be judged by the same standards that are applied to ordinary books and, hence, that Gautier's work could not be banned, it has been increasingly recognized that classics must receive unique treatment.[9] *The Decameron, Candide,* and similar

[7] John Henry Cardinal Newman, *The Idea of a University Defined and Illustrated* (New York, America Press, 1941), Discourse IX, p. 248.

[8] Since in current practice a judge is more likely to hear an obscenity case than is a jury, we shall limit our attention to him.

[9] At least one writer on the subject of obscenity has objected that it is foolish to give legal absolution to Boccaccio and to condemn to the incinerator books which say the same thing but which do not say it so well. See Wayland Young, "Obscenity," *The Twentieth Century,* Mar., 1955, p. 241.

works cannot now be banned for longer than it takes a court to issue a restraining order. However, this issue is not relevant to *Lady Chatterley,* for the novel is not regarded as a classic in the sense that *Mademoiselle de Maupin* is a classic. Indeed, it is not even regarded by some critics as one of Lawrence's best novels.

(2) *What do respected literary critics think of the book?* This question has been asked in most obscenity cases since the *Ulysses* trial, in which Judge Woolsey decided that the opinion of critics was germane to the issue. The question has been hotly debated, for a number of censors have argued that the normal man's reactions to a book are the standard by which obscenity is to be determined and that literary critics, who are more likely to be "sophisticated," are automatically disqualified as witnesses.

Perhaps the most cogent refutation of this argument is that the opinions of literary critics are essential, if only to correct the censors' erroneous interpretations of the text. This was illustrated in the hearings before a Post Office Department judicial officer when the attempt was made in 1959 to ban *Lady Chatterley* from the mails. The counsel for the Post Office found it very difficult to see the book in its total perspective, and read into certain passages meanings which they simply did not contain. The testimony of two literary critics, Malcolm Cowley and Alfred Kazin, proved valuable in defining more accurately both the over-all theme of the novel and the meaning of the specific passages which disturbed the counsel.[10]

In the court action involving *Lady Chatterley* subsequent to this hearing, the trial judge, Frederick vanPelt Bryan of the U.S. District Court (Southern District of New York), considered the published opinions of two other distinguished and respected literary critics, Archibald MacLeish and Mark Schorer, and noted the testimony of Cowley and Kazin. He concluded: "The book is replete with fine writing and with descriptive passages of rare beauty. There is no doubt of its literary merit." [11]

[10] "The Trial of 'Lady Chatterley's Lover,'" New York *Post,* May 25-28, 1959.

[11] *Grove Press, Inc. and Readers' Subscription, Inc., v. Robert K. Christenberry.* The decision is reprinted in several places, including the Pocket Books edition of *Lady Chatterley's Lover;* D. H. Lawrence, *Sex, Literature, and Censorship;* and the *Evergreen Review,* Summer, 1959.

(3) *What is the author's intent?* Is the "leer of the sensualist" to be found in *Lady Chatterley?* If it is, then the book is pornographic, "dirt for dirt's sake"; according to contemporary legal standards, it must automatically be banned.

Obscenity differs from pornography in that obscenity has a serious intent and usually has some respect for sex, while pornography distorts and disfigures sex until sex becomes ugly and vile. Here, however, we have another dilemma. Regardless of the author's intent, any given presentation of sex could appear ugly and vile to some readers. For this reason, the practice of seeking to determine the author's intent has been challenged. If we disregard this issue, however, we run the risk mentioned by Judge Bok that a moron could pervert any stimulus into a sexual fantasy. An author's serious intent, like the status of the classics, serves as a safeguard against unrestrained, absurd censorship.

With regard to *Lady Chatterley,* Judge Bryan found: "[The] plot serves as a vehicle through which Lawrence develops his basic theme of contrast between his own philosophy and the sterile and debased society which he attacks. Most of the characters are prototypes. The plot and theme are meticulously worked out with honesty and sincerity."

Having established the reputation of *Lady Chatterley,* the judge must next determine how its views compare with contemporary community standards. According to the Supreme Court decision in the *Roth* case, the question whether a book appeals to prurient interest must be answered in the light of currently accepted standards and values. Here again the testimony of literary critics may be of some value, but the judge must reach his own conclusions. To do so, he must be aware of what is going on about him—not merely of the day-to-day happenings in his courtroom, but also of recent developments in psychology, sociology, religion, philosophy, and medicine. The temper of a society changes, and the standards of one generation will almost certainly not be the standards of the next. In the 1920s, for example, the work of Havelock Ellis was regarded with abhorrence; a few years later, the comparable findings of Alfred Kinsey encountered considerably milder denunciations. The courts

must be certain that they are attempting to protect sensibilities of the present, not of the past.

Judge Bryan's consideration of these points with regard to *Lady Chatterley* is terse and clear:

. . . the Postmaster General's finding that the book is non-mailable because it offends contemporary community standards bears some discussion.

I am unable to ascertain upon what the Postmaster General based this conclusion. The record before him indicates general acceptance of the book throughout the country and nothing was shown to the contrary. The critics were unanimous. Editorial comment by leading journals of opinion welcomed the publication and decried any attempts to ban it. . . .

The contemporary standards of the community and the limits of its tolerance cannot be measured or ascertained accurately. There is no poll available to determine such questions. Surely expressions by leading newspapers, with circulations of millions, are some evidence at least as to what the limits of tolerance by present day community standards are, if we must embark upon a journey of exploration into such uncharted territory.

Quite apart from this, the broadening of freedom of expression and the frankness with which sex and sex relations are dealt with at the present time require no discussion. In one best selling novel after another frank descriptions of the sex act and "four-letter" words appear with frequency. These trends appear in all media of public expression, in the kind of language used and the subjects discussed in polite society, in pictures, advertisements and dress, and in other ways familiar to all. Much of what is now accepted would have shocked the community to the core a generation ago. Today such things are generally tolerated whether we approve or not.

I hold that, at this stage in the development of our society, this major English novel does not exceed the outer limits of the tolerance which the community as a whole gives to writing about sex and sex relations.

Having considered the reputation of the book itself and its relation to contemporary community standards, the judge must then weigh carefully the material that has offended the censors. He is guided by three criteria:

(1) *Can the passages under discussion validly be questioned*

as obscene? Occasionally a censor has found fault with parts of a book for reasons other than that of obscenity but has put the label of obscenity upon them. However, only passages which may be justly questioned as obscene will be considered by a court. Sacrilege, unorthodox political and economic views, and other unpopular ideas are almost always granted the protection of the First and Fourteenth Amendments. As Justice Brennan noted in *Roth,* "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." Obscenity stands on the borderline between the haven of social importance and the limbo of the inconsequential. It is vitally necessary, therefore, that the material charged with being obscene can conceivably be so accused. In the case of *Lady Chatterley,* however, this problem was not an issue.

(2) *Are the passages in question an integral part of the book?* This question is centrally important, for the book as a whole—not selected passages—must be adjudged obscene or pure. The court must determine whether the objectionable passages make a necessary contribution to the development of the theme of the book or whether they overwhelm that theme in a flood of filth. If the latter happens, then the book is in danger. In the case of *Lady Chatterley* it does not happen. In the words of the District Court decision: "These passages are relevant to the plot and to the development of the characters and of their lives as Lawrence unfolds them. The language which shocks, except in a rare instance or two, is not inconsistent with character, situation or theme."

(3) *What is the dominant effect of the book, considered as a whole, upon the average, normal person?* This is the crucial issue; all other questions are preliminary to it. The answers to the other questions will have prepared the ground for this issue, but the judge must still consider a new variable: are the allegedly obscene passages so outspoken that, while necessary to the book,

they overshadow the book's intention? Do they make the book as a whole too strong for the average, normal reader?

Faced with this question, a judge must rely almost entirely on his own judgment, tempered only by the reactions of others who have also read the book. If Judge Bryan had concluded that certain passages in *Lady Chatterley,* even taken in context, would debauch the average reader's mind, he would have had no choice but to ban the novel. He found, on the contrary, that the dominant effect on the reader is created not by individual passages, but by the over-all structure and mood of the book. Moreover, "the dominant theme, purpose and effect of the book as a whole is not an appeal to prurience or the prurient minded. The book is not 'dirt for dirt's sake.' "

Because the judge's decision on this issue is essentially subjective, verdicts in obscenity cases are usually expressions of taste and sensitivity rather than rigid applications of legal categories. The taste and the sensitivity are not merely those of the judge, but also those of the critics whose opinion he respects. What Postmaster General Arthur E. Summerfield and the Rev. Dr. Poling found to be "filth" in *Lady Chatterley,* Judge Bryan, Archibald MacLeish, Mark Schorer, Malcolm Cowley, and Alfred Kazin found inoffensive. This dependence upon private judgment may not be the most desirable method of deciding what a society may read; it is, at present, simply inevitable.

In most cases involving alleged obscenity, the judge will encounter a number of other, incidental issues. Some of these are blatantly irrelevant, but three are so commonly cited that they deserve serious examination.

(1) *What effect will the material in question have on young or unbalanced minds?* Does not *Lady Chatterley,* for example, persuade such readers that extramarital sexual relations are morally permissible? Does it not suggest to them that walks in the woods are better suited to something more intimate than bird-watching? Does it not imply that four-letter Anglo-Saxon words are part of the polite discourse of our society?

We shall have occasion to discuss the problem of young

readers in more detail when we deal with extra-legal restrictions upon the mass media. It suffices to say here that a judge who is aware of the Supreme Court's findings in *Roth* and in *Butler* will not allow this argument in behalf of the young and the mentally disturbed to influence his final decision. "It is not," Judge Bryan said flatly, "the effect upon the irresponsible, the immature or the sensually minded which is controlling." Society is not required to surrender or starve its mature intelligence in order to protect the juvenile mind.

(2) *To whom is the book available?* This question arises originally from the fact that some scientific books—studies in sexology and psychiatry, for example—are designed and distributed for a particular professional audience. It is possible, however, that some of these books may fall into hands other than those for which they were intended. If they are advertised, priced, and distributed in such a way as to be easily accessible to most readers, a censor might insist that they be banned to both the special audience and the general public. So long as these books are obviously directed toward their specialized clientele, the "probable audience" argument protects them, in theory at least, from the censors.

The same argument is frequently applied, however, to adult books which in paper-back form may reach the young. In such a context it is irresponsible. As Judge Bryan declared: "The material must be judged in terms of its effect on those it is likely to reach who are conceived of as the average man of normal sensual impulses, or, as Judge Woolsey says, 'what the French call l'homme moyen sensuel.' " The "probable audience" argument is valid only within the line of thought we have traced from Judge Woolsey to Judge Bryan.

Even with regard to the serious scientific book and other special volumes, a special legal provision for them based on their probable audience creates more danger than it averts. The danger is that courts will be tempted by this argument to restrict the sale and distribution of books which would not, in fact, harm those for whom they were not intended. The "probable argu-

ment" approach is therefore so dangerous—and, as long as we have *l'homme moyen sensuel* rule, so unnecessary—that it had best be avoided.[12]

(3) *Does the book in question deal with subjects commonly regarded as immoral?* While this issue is a favorite of censors everywhere, it has no legal validity, except in relation to the problem of contemporary community standards. A charge of immorality is in itself worthless. Justice Potter Stewart, in a case dealing with motion pictures, enunciated a rule which applies to books as well:

> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.[13]

To this extent, the Court has supported part of Judge Bok's belief that "the criminal law is not in my opinion the *'custos morum* of the king's subjects.' " A subject or attitude may be deemed immoral and still be freely discussed. The court is not concerned, Judge Bryan declared, "with whether the community would approve of Constance Chatterley's morals. The statute does not purport to regulate the morals portrayed or the ideas expressed in a novel, whether or not they are contrary to the accepted moral code, nor could it constitutionally do so."

These, then, are the essential issues found in nearly all disputes arising out of attempts to censor a book. In actual experience, personalities and totally unrelated matters will also

[12] For an opposite view, see William B. Lockhart and Robert C. McClure, "Obscenity in the Courts," *Law and Contemporary Problems,* Autumn, 1955. See also "Paperback Wholesalers Support 'Model Statute' on Obscenity," *Publishers' Weekly,* Nov. 16, 1959, pp. 30-31.

[13] *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 688-89. The case involved the film version of *Lady Chatterley.*

become involved. In Great Britain, for example, the case against Havelock Ellis' *Studies in the Psychology of Sex* was thrown into a great muddle because of the admixture of such disparate factors as a group of apathetic anarchists and a league to improve the status of the illegitimate child.[14]

In considering the Post Office Department's banning of *Lady Chatterley,* Judge Bryan was fortunate enough to have been spared such extraneous complications. Once he had settled certain problems involving the powers of the postmaster general, he was able to deal with the basic issues outlined in this chapter. His comments on each of these issues have already been quoted. Following the standards established in earlier cases, especially *Ulysses* and *Roth,* he drew the inevitable conclusion:

> Judged by these standards, "Lady Chatterley's Lover" is not obscene. The decision of the Postmaster General that it is obscene and therefore non-mailable is contrary to law and clearly erroneous. This is emphasized when the book is considered against its background and in the light of its stature as a significant work of a distinguished English novelist. . . .
>
> To exclude this book from the mails on the grounds of obscenity would fashion a rule which could be applied to a substantial portion of the classics of our literature. Such a rule would be inimical to a free society. To interpret the obscenity statute so as to bar "Lady Chatterley's Lover" from the mails would render the statute unconstitutional in its application, in violation of the guarantees of freedom of speech and the press contained in the First Amendment.

[14] See Dale Warren, "Dr. Kinsey and Mr. Ellis," *The Saturday Review,* Feb. 7, 1959, pp. 14-15, 57.

Chapter VII. Bookman, Spare That Child!

> Today, due to the unrestricted freedom of speech and press and communications, the Catholic child doesn't have to seek out trouble. It comes to him in the home over TV. In the movies he sees how to commit crimes, in the drug stores he can pick up an obscene book cheap. The community doesn't care because the Supreme Court doesn't care, and I suppose the Supreme Court doesn't care because it considers morality and religion as private affairs.
>
> John B. Sheerin, *The Catholic World,* April, 1957

The foregoing chapters have been focused upon the activities of the censors against hard-cover books and, in one or two examples, against magazines and pamphlets. We have examined some of the problems which arise out of attempts to restrict the production, sale, and distribution of allegedly obscene literature by legal means. The process of imposing legal restraints upon such materials we have called censorship. As we move away from the realm of hard-cover books and into the realm of paper-bound books, comics, and magazines we find ourselves dealing with new problems, arising in large part out of the use of extra-legal influence and pressure applied by private citizens to restrict the sale and distribution of these materials. This extra-legal process we have defined as control. As we have noted earlier, the word "comstockery" embraces both of these forms of social restraint upon cultural expression.

Censorship is a social procedure destructive of human vitality, creativity, and growth. We shall shortly be required to consider whether the same must be said for control. Many of the objects of comstockery's wrath, however, do America little

credit as a reflection of our cultural preferences. This is especially true of comic books and the cheap magazines which fill many of our drugstores, variety stores, and newsstands. These publications capitalize on their readers' curiosity, inhibited aggressions, romantic dreams, and desires for vicarious thrills. Comic books, which in depicting wartime experiences lost much of their humor, have in time of peace reveled in crime, lust, torture, and the butchering of men, women, and children. In the words of Fredric Wertham, a psychiatrist and neurologist who has spent many years studying the so-called comics:

> The content of the majority of comic books is something that has never happened in such concentration and profusion before in any children's literature. The ingredients spelled out, pictured, and glorified are violence, cruelty, sadism, crime, beating, promiscuity, sexual perversion, race hatred, contempt for human beings, descriptions of every conceivable crime, every method of concealing evidence, and every way to avoid detection.[1]

It is important to note that Dr. Wertham is speaking of the "concentration and profusion" of this material, for the preoccupation of comic books with violence is nothing new. Mary Noel speaks of the grotesque character of the dime novels which so entertained youngsters in the late nineteenth century:

> The silvery beams of the moon did not fall upon a face, but upon a "pain-distorted countenance," which was "rendered doubly repulsive by the red streaks where the mingled blood and brains had oozed from the shattered skull." [2]

The pre-World War I gangsters knew all the fine arts of torture as well:

[1] Fredric Wertham, "It's Still Murder; What Parents Still Don't Know about Comic Books," *The Saturday Review,* Apr. 9, 1955, p 12. See also Kenneth E. Eble, "Our Serious Comics," *The American Scholar,* Winter, 1958-59.

[2] Mary Noel, "Dime Novels," *American Heritage,* Feb., 1956, p. 52.

Criminals were always provided with a variety of improvised prisons. . . . Nevertheless, there was always a way out, especially for an inventive operative like Nick Carter. He was capable of making his escape past thirteen masked ruffians and one "radiant creature" named Elmora who carried a jeweled stiletto. . . . These particular criminals were given to cowls and robes of silver and gold and blue and white, and to marching to the chant of the radiant Elmora accompanied by an automatic organ. They had a torture chamber lined with skulls through whose eyes shone ghastly red lights, and filled with skeletons bending over the intense fire of an open furnace. Over the center of the furnace hung a tackle and sling, and on one side of the room was a chair, equipped with steel fingers to sink into the skull of the occupant. To Nick this was practically a playroom.[3]

Our contemporary tales of ghoulish horror, complete with full-color pictures and edifying dialogue, are not much different from the dime novels. Our comic books are, however, much more easily accessible to children, because of the improved methods of production and distribution, the increase in the amount of money in children's hands, and the relaxation of parental supervision of what children do when they are not in school. And unlike the dime novels, our comics are not addicted to frosting their sadism with pious Sunday School maxims.

Adults are apt to gasp when they hear what is available to Junior, but their own reading tastes are frequently not much better. Many adults would doubtless be regular readers of the cheap magazines if they did not fear the social stigma that would result.[4] They pass by *Confidential* in favor of *Reader's Digest* because they demand reading that will bolster their social standing and help them to easier and more "respectable" social relationships. The pulp magazines, on the other hand, sell primarily to people who like such trash and don't care who knows it. These people can often prove very disconcerting to the censors.

[3] *Ibid.*, p. 112.

[4] See Douglas Waples, Bernard Berelson, and Franklyn B. Bradshaw, "Why They Read," in Wilbur Schramm, *The Process and Effects of Mass Communication* (Urbana, University of Illinois, 1954), p. 64 *et passim.* Even the ladies of the Chicago Citizens' Committee for Better Juvenile Literature were hesitant to carry home the publications they were supposed to judge.

In Vincennes, Indiana, for example, a city councilor undertook a campaign to purge the community's newsstands of "indecent" magazines. He abandoned his project when, while he was urging a dealer to remove a collection of "girlie" magazines, two elderly women entered the store and asked for "pinup pictures of men with big muscles." [5]

One might describe the pulp magazines as comic books for grownups, for much of the material between the lurid covers of these periodicals is only an extension of what Junior is reading out in the front yard. The core of crime and sadism is still there, now considered "adult" because the stories are supposedly factual and are illustrated by photographs rather than cartoons. Death plays as great a part in these magazines as it has come to play in the comic books, and there are the same references to the Grim Reaper, Fate, and Destiny. It is surely not accidental that astrologers are among the most loyal advertisers in these adult periodicals.

If it were possible to draw a sharp line between the audiences of children's and adult publications, the task of the censors and of those who oppose them would be easier. Such a line, however, does not exist. A good many adults have not progressed beyond comic books, and many adolescents are dipping rather frequently into cheap adult magazines. The cry has gone up, therefore, that even if the pulp magazines are considered fit for adults, they must not be allowed to reach the hands of the young. Many public and private officials have declaimed that if comic books and cheap magazines are not thoroughly censored by their producers, public-spirited citizens should do the job.

Several attempts were made by the comic-book industry to comply with this ultimatum, but these efforts have not been favorably received. Indeed, it appears from the hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, held in 1954, that little can be expected from the comic-book manufacturers. Senator Estes Kefauver, discussing comic-book covers with Mr. William Gaines, publisher of the Entertaining Comic Group, asked: "Here is

[5] Associated Press dispatch dated Jan. 7, 1959.

your May 22 issue. This seems to be a man with a bloody ax holding a woman's head up which has been severed from her body. Do you think that is in good taste?" Mr. Gaines replied: "Yes, sir; I do, for the cover of a horror comic. A cover in bad taste, for example, might be defined as holding the head a little higher so that the neck could be seen dripping blood from it and moving the body over a little further so that the neck of the body could be seen to be bloody." [6] This is too fine a distinction for the opponents of horror comics, especially since they refuse to accept the need of showing any decapitation at all.

With inadequate self-control on the part of the comic-book industry, certain civic groups have taken up the cudgels against the lurid literature which is available to children and adolescents. Citizens' committees have sprung up across the country. Relying on persuasion and economic pressure, they seek to induce retailers to comply with what the committees believe are reasonable requests. After examining the regular issues of various periodicals, these local groups frequently issue lists of objectionable magazines and comic books. Members then tour the stores which sell them and ask the dealers to remove them from their shelves. If the dealers agree, they are regarded as lovers of children, truth, goodness, beauty, America, and the home. If they refuse, they are looked upon as crass materialists (*not* capitalists) or as smut addicts. Frequently the citizens' committees have the support of the local police department and can brandish the threat of legal action over the head of any hesitant retailer. Under such circumstances, compliance is wisdom.

At least one police chief has tried to serve as a controller, while wearing on his coat the threat of censorship. Chief Joe Kinsella of Stamford, Connecticut, undertook a private war on objectionable magazines. At the prompting of PTA leaders, teachers, and ministers, he prepared a list of publications which seemed to him unfit for children and sent a copy to each Stamford newsdealer with the following letter:

[6] Quoted by John E. Twomey, "The Citizens' Committee and Comic-Book Control: A Study of Extragovernmental Restraint," *Law and Contemporary Problems*, Autumn, 1955, p. 624.

Enclosed is a list of objectionable or obscene magazines which you are requested to remove permanently from sale by local output. I know that in this list there are some which are acceptable as second class mail, but I request the list be followed as given. If there is some particular publication which you would like to discuss on an individual basis, I will be glad to talk it over with you. I would like this to become effective immediately upon receipt of this communication.

When a few newsdealers objected, they were warned that drastic measures would be used, if necessary, to force compliance with Kinsella's ruling. Thus, without judicial determination of obscenity, without reference to anything save the moral judgments of a few police officers, a sizable number of magazines disappeared from the newsstands of Stamford.[7]

Citizens' committees often depend upon state or regional organizations for moral, financial, or advisory support. They also maintain close relations with groups engaged in similar work. Thus, the Chicago Committee for Better Juvenile Literature was in continual communication with the Veterans of Foreign Wars, the Chicago Retail Druggist Association, the Camp Fire Girls, the Illinois Federation of Temple Sisterhoods, the Illinois Youth Commission, the Chicago Grandmothers' Club, the Association of University Women, various PTA's, the Woman's Auxiliary of the Episcopal Diocese of Chicago, the General Federation of Women's Clubs, the National Office for Decent Literature, and the Illinois Council on Motion Pictures, Radio, Television, and Publications.[8] Frequently the officers of one of these groups hold responsible positions in others. A system of interlocking directorates is thus set up.

[7] Ann Pinchot, "What One Community Did to Protect Its Youth from Muck Magazines," *Guideposts Magazine*, Mar., 1958, pp. 16-18. Norman Vincent Peale in an addendum to this article urges citizens to form committees for the cleaning up of their local newsstands: "Make sure you have a specific list of offending publications. Then approach the newsstand dealers reasonably, pointing out that all citizens should work together for the common good of local children. . . . If any newsstand dealers refuse or pass the buck to the distributor, take the matter to local officials to see how laws against indecent literature can be enforced."

[8] Twomey, *op. cit.*, pp. 628-29.

The organizations included in this example represent a significant cross section of educational, religious, professional, and veterans' groups. By far the most important of these groups in moral influence are the religious associations, and of these the most powerful is the National Office for Decent Literature (formerly known as the National Organization). The NODL is a Roman Catholic group of national scope with headquarters in Chicago. As the most potent force against comic books, paperbound books, and pulp magazines in America today, it has aroused both bitter opposition and warm applause. Its nationwide influence is suggested by a list of a dozen civic groups which, according to Father Gardiner, were in touch with the NODL during a short span of time:

Newport (R.I.) Citizens' Committee on Literature, Inc.
Citizens' Committee for Decent Literature, Joliet, Ill.
Decent Literature Committee, Camden, West Virginia
Decent Literature Council, Coral Gables, Florida
Muhlenberg Township Parent-Teacher Association, Laureldale, Pennsylvania
City of Poughkeepsie's Committee on Questionable Literature, Poughkeepsie, N.Y.
Parent-Teachers' Association, Kalamazoo, Michigan
Committee for Clean Literature, Corpus Christi, Texas
Springfield Church Group for Promotion of Decent Literature, Springfield, Vermont
Advisory Board on Objectionable Publications to the Government of the Province of Alberta, Canada
Georgia Literature Commission
Mayor's Committee on Decent Literature, Burlington, Iowa[9]

The NODL was established by the Catholic Bishops of the United States in 1938 with the avowed purpose of setting "in motion the moral forces of the entire country . . . against the lascivious type of literature which threatens moral, social, and

[9] Harold C. Gardiner, *Catholic Viewpoint on Censorship* (Garden City, Hanover House, 1958), pp. 140-41, note 7.

national life." [10] It was to be concerned only with ridding our stores of such literature, regardless of who does the cleanup job. "The NODL office was, and is, merely a service organization to coordinate activities and supply information to all interested groups regardless of race, color, or creed." Its attention was originally focused solely on magazines; beginning in 1947, it extended its interests to comic books and paperbound books.

The NODL has an extensive reviewing system. "Comic books are reviewed every six months by a committee of approximately 150 mothers, divided into groups of five." If four out of five mothers decide that the book is "unsuitable," it is put on the NODL list of objectionable publications. If five reviewers find it acceptable—and if, six months later, five other reviewers agree after having read a different issue—the book is placed on the NODL list of acceptable publications. When a comic book is deemed to be on the borderline, it remains unclassified.

Magazines are reviewed once a year by this same committee of mothers, but with a difference in procedure. One individual reads the magazines, marks the passages she finds objectionable according to the NODL Code, gives a judgment on the magazine, and returns it to the NODL office. Here, five reviewers go over the marked passages to determine the validity of the original reviewer's judgment. If they agree with it, then a total of six persons have decided that the magazine should be placed on the objectionable list before it is so ordered.

The same method is followed with pocket-size books, except that in most cases the original reviewer is a college graduate. The committee that finally decides on placing the book on the list is composed entirely of college graduates. Thus, NODL can inform the inquiring publisher that people who appreciate literary values have evaluated his book and found it unsuitable for youth.

The NODL has a code which, in its own words, "explicitly defines the area of objectionable content for youth reading." To

[10] This and the following quotations come from the literature which the NODL distributes to all who are interested in its work. Father Gardiner quotes the complete texts in his book, pp. 109-116.

be listed as objectionable, a publication must enact at least one of the following crimes against morality:

(1) Glorify crime or the criminal.
(2) Describe in detail ways to commit criminal acts.
(3) Hold lawful authority in disrespect.
(4) Exploit horror, cruelty or violence.
(5) Portray sex facts offensively.
(6) Feature indecent, lewd or suggestive photographs or illustrations.
(7) Carry advertising which is offensive in content or advertise products which may lead to physical or moral harm.
(8) Use blasphemous, profane or obscene speech indiscriminately and repeatedly.
(9) Hold up to ridicule any national, religious or racial group.

The central staff of the NODL consists of an executive director, a part-time assistant, and a full-time secretary. These people coordinate the activities of the reviewers and handle the distribution of the *Newsletter,* lists, and other materials.[11] A sizable number of Catholic groups subscribe to this literature.

Armed with NODL lists, local Catholics or other friends of the NODL pay regular visits to retailers of comic books, magazines, and paperbound books. Here are some of the publications listed in October, 1958, as "disapproved for youth":

Among the paperbound books—*Deadly Combo . . . Rage to Kill . . . Take it Out in Trade . . . Naked Sin . . . Battle Cry . . . Never Love a Stranger . . . Ten North Frederick . . . Affairs of a Beauty Queen . . . The First Lady Chatterley . . . The Blackboard Jungle . . . Something of Value . . . Bonjour Tristesse . . . A Certain Smile . . . Ninth Wave . . . Peyton Place . . . The Great Debauch . . . Park Avenue Tramp . . . To Have and Have Not . . . The Well of Loneliness . . . Violent Wedding . . . Andersonville . . . Catcher in the Rye . . . Forever Amber . . . From Here to Eternity . . . God's Little Acre . . . The Naked and the Dead . . . The Sure Hand of*

[11] Father Gardiner quotes the meager resources and small staff of the NODL in an unsuccessful attempt to refute the charges made against it by Morris L. Ernst of the Civil Liberties Union. Cf. Gardiner's book, pp. 137-39.

God . . . Tobacco Road . . . The World of Suzie Wong . . . Rally Round the Flag, Boys.

Among the magazines—*Adventure . . . Behind the Scene . . . Detective Cases . . . Figure . . . Gee-Whiz . . . Gent . . . Grecian Guild Pictorial . . . Headquarters Detective . . . Male . . . Monsieur . . . Real Detective . . . Snappy . . . Suppressed . . . Tomcat . . . Vim . . . Vue . . . Wham . . . Zip . . .* and four mass-circulation magazines: *Cavalier, People Today, Personal Romances,* and *Playboy.* Only acceptable comic books are listed by the NODL.

Other lists of the offensive paperbound books have included: *Bhowani Junction . . . Waterfront . . . The Devil Rides Outside . . . Raintree County . . . The Egyptian . . . The Great Man . . . Somebody Up There Likes Me . . . Mademoiselle de Maupin . . . Baby Doll . . . Tea and Sympathy . . . The Bramble Bush . . . Call Girl . . . Lady Chatterley's Lover . . . Room at the Top . . . The Wapshot Chronicle. Confidential* and *True Life Stories* were at one time included among the magazines.

Armed with a list of these and many other titles, local NODL supporters set out to clean up the town, always keeping in mind the following instructions:

It is suggested that the members of a committee introduce themselves to the owner, manager or clerk in attendance; and, where the purpose of the Decent Literature Crusade is not already known, a short explanation should be given, stressing the need for the protection of the ideals of youth. Next the list of objectionable publications should be shown and a request made for the privilege of examining the publications on display.

Where no objectionable titles are found, the committee should commend the owner or manager. Favorable publicity for this dealer should be obtained both at local and community level.

Where objectionable titles are found, courteously recommend that the manager or owner remove such publications from sale. When the dealer complies, favorable publicity should be given him.

Instruct your committee workers to leave silently if the owner, manager or clerk refuses cooperation. Little is ever gained by argument, but silence can often be most effective.

As part of its "general information on organization" the NODL has this to say about the use of its lists:

> Any responsible group which of its own volition and choosing decides to use the NODL list in its campaign, has NODL's permission to do so. NODL indicates, however, that the list is merely an expression of a publication's non-conformity with the NODL Code, and that the list is not to be used for purposes of boycott or coercion.

Despite such a warning, the NODL's lists have been used for purposes of boycott. According to John Fischer, who launched a vigorous attack against the NODL in 1956, "Laymen from Catholic churches in the four northern counties of New Jersey—Union, Hudson, Essex, and Bergen—began to call on merchants" early in 1955. "These teams were armed with the NODL lists. They offered 'certificates,' to be renewed each month, to those storekeepers who would agree to remove from sale all of the listed publications. To enforce their demands, they warned the merchants that their parishioners would be advised to patronize only those stores displaying a certificate." Thereafter the Sacred Heart Parish Societies of Orange, New Jersey, published a list of fourteen merchants who had complied with the Parish Decency Committee's requests. With the list was a recommendation: "Please patronize these stores only. They may be identified by the certificate which is for one month only." [12]

The NODL's lists have been employed as guides to bad literature by police officials and by commanders at army posts, and the paperbound books and magazines condemned by NODL have been removed. So eminent a Roman Catholic thinker as the Rev. John Courtney Murray has attacked this practice, as well as the coercive measures described by John Fischer.

> Unquestionably, officers of the law have full right to use the weapons of law, which are coercive. The point in question, however, is their

[12] John Fischer, "The Harm Good People Do," *Harper's Magazine*, Oct., 1956; this is graciously reprinted in full by Father Gardiner, *op. cit.*, pp. 157-63.

use of the NODL list. This puts NODL in an ambiguous position. It cannot expect to have the thing both ways. It cannot, on the one hand, protest that "the list is not to be used for purposes of boycott or coercion," and, on the other hand, fail to protest against the use of the list by the police. It has to choose its cooperators—either the merchant or the police. It cannot choose both; for the choice is really between opposed methods of cooperation—the method of voluntary cooperation as between equal citizens, or the method of coercion as used by the police.

Father Murray then issues a strong warning to the leaders of the NODL:

If NODL consents to the use of its list by the police, it creates an ambiguity that its critics may rightly seize upon, as Mr. Fischer did; what is worse, it obscures from public view its own "idea," the altogether valid idea of voluntary reform. On the other hand, if NODL does not consent to the use of its list by the police, it should say so—publicly, and on every necessary occasion. Surely part of its service must be the supervision, conducted on its own principles, of the uses to which its list is put.[13]

As for the "certificates" awarded to compliant retailers, Monsignor Thomas J. Fitzgerald, executive secretary of the NODL, has said that "the NODL office discourages the use of seals of compliance . . . from a practical viewpoint—a merchant may stop cooperating after a few months and still will have his seal." The NODL is not, however, opposed to these awards in theory.[14]

Monsignor Fitzgerald's comment was made in reply to the controversy aroused by the "Statement on Censorship Activity by Private Organizations and the National Organization for Decent Literature," issued on May 5, 1957, by the American

[13] John Courtney Murray, "The Bad Arguments Intelligent Men Make," *America*, Nov. 3, 1956. This is also reprinted by Gardiner, *op. cit.*, pp. 164-72.

[14] Interview in *Publishers' Weekly*, May 20, 1957, p. 15; quoted by Gardiner, *op. cit.*, p. 117.

Civil Liberties Union. The ACLU objected to the use of the NODL's material by police and military officials on the grounds that the NODL was imposing its values upon the whole society when it allowed its lists to be used by the authorities. The "Statement" also took issue with the use of boycotts against recalcitrant retailers. It was signed by the officers of the ACLU and by a number of prominent writers, critics, and editors.[15]

Father Gardiner has reacted strongly against the ACLU "Statement." Writing with more than a little bitterness, he attempts to demolish it by showing that the ACLU and the people who signed the protest have not the slightest idea what the NODL is doing. What is more, he charges, "the ACLU and similar groups are engaged in a campaign to censor . . . the NODL out of existence by disagreeing with their right to disagree and putting their own criticism on a phony basis of 'Americanism.' " [16]

The NODL, says Father Gardiner, merely wants to open the way for cooperation between those people who wish to protect the minds and morals of the young and those who sell comic books, magazines, and paperbound books. Being a loosely knit organization, the NODL cannot make sure that its lists are always used properly. This is unfortunate, but the NODL is nevertheless a very worthwhile group. As for the freedom to read, Father Gardiner declares:

If the NODL, even granted that it acts within the letter of the law, succeeds in persuading a newsstand operator to remove some reading

[15] Signers of the "Statement" included Cleveland Amory, Jacques Barzun, John Mason Brown, Van Wyck Brooks, Walter D. Edmonds, James T. Farrell, A. B. Guthrie, Richard Hofstadter, Mark De Wolfe Howe, Joseph Wood Krutch, Arthur Miller, Allan Nevins, Reinhold Niebuhr, John O'Hara, H. A. Overstreet, Katherine Anne Porter, Eleanor Roosevelt, Budd Schulberg, Irwin Shaw, Upton Sinclair, Rex Stout, Mark van Doren, Robert Penn Warren, Edmund Wilson, Howard Mumford Jones, Perry Miller, Lionel Trilling, Alfred A. Knopf, and M. Lincoln Schuster. The "Statement" is available to the public through the New York offices of the ACLU. It is reprinted by Gardiner, *op. cit.*, pp. 173-78, and is summarized in the New York *Times*, May 6, 1957, p. 22.

[16] Gardiner, *op. cit.*, p. 146.

matter to which it objects, it is thereby depriving some, perhaps a majority, of American citizens in that locality of free access to reading matter which they do not agree is objectionable. Their "right to read" is curtailed because a minority group has imposed its moral judgment on a situation in which the American citizen is legally free. The NODL agrees that any citizen is legally free to read anything that has not been declared by law a violation of obscenity statutes; but it maintains that a good citizen, if alerted by morally aroused public opinion, will be willing to waive this legal right for the common good, especially as it touches the young.[17]

This genial willingness to have other people waive their legal rights may impress Father Gardiner as a reasonable solution to the conflict between censorship and freedom. Not everyone who considers the problem would agree.

Lest any Protestant reader begin to feel a little smug at this point, a word should be added about a Protestant group which has the potential of becoming the NODL's mirror. In September, 1957, representatives of evangelical churches and of the decent literature commissions of Florida, Georgia, and Rhode Island organized the Churchmen's Commission for Decent Publications. Inman H. Douglas of the Christian Science Committee on Publications was elected chairman, and O. K. Armstrong, a former congressman from Missouri and a Southern Baptist, assumed leadership of the committee on legislation.

According to the group's constitution, its purposes are as follows: to provide coordination of church, organizational and individual efforts to eliminate the sale and distribution of indecent and obscene material; to encourage higher standards of publications; to encourage the writing and publishing of Christian literature discussing the problems of sex morality and setting forth the Judaeo-Christian philosophy of sex in relation to contemporary culture; to provide for education on the need of federal, state and local laws to curb the sale and distribution of indecent and obscene publications; [and] to cooperate with local, state

[17] *Ibid.*, pp. 120-21.

and national groups for the enforcement of laws controlling obscene publications. . . .[18]

The Commission also planned to issue lists which would evaluate various publications. After almost a year of quiescence, the group initiated a campaign against *Playboy* magazine which resulted in a largely ineffective banning of the November, 1958, issue from the mails.[19]

It is much too early to make any extensive comments upon the Commission. It would appear, however, that a number of Protestant leaders have decided to share in the present fight against objectionable publications in behalf of the young. As we look more closely at certain problems inherent in the activities of groups such as the NODL, let us also keep the Churchmen's Commission for Decent Publications in mind.

[18] *Publishers' Weekly,* Dec. 30, 1957, p. 49; and "Of Censorship and Decency," *The Christian Century,* Jan. 29, 1958, p. 125. The Massachusetts Council of Churches has suggested a stand similar to that of the Churchmen's Commission, but is more critical of the use of lists. It does, however, urge that appeals be made to the sense of community responsibility of magazine vendors. See Myron W. Fowell, "A Suggested Approach to the Problem of Obscene Literature for Local Church Social Action Committees" (Boston, Council of Churches, 1959).

[19] New York *Times,* Oct. 29, 1958, p. 27; and the "NODL Newsletter," Jan., 1959, p. 6.

Chapter VIII. The Moral Kindergarten

> I should like very much to be able to live again and to arrange for my own bringing up. Under such circumstances I should provide that some parent, guardian or teacher should give me a dirty book as required reading. This ought to happen at about the age of eight or nine, for at the end the little scholar could hardly fail to say, "And is this all there is to it?" Thereafter, he might mature to useful life, untroubled by vague speculations concerning the exciting horrors of the unknown.
>
> Heywood Broun, in Broun and Leech: *Anthony Comstock*

In his defenses of the NODL, Monsignor Fitzgerald, executive secretary of that organization, frequently declares that the NODL is protecting, not merely Catholic morals, but American morals as well:

> Our American society, as its inheritance from Western culture, has definite moral standards and principles which we all respect, notwithstanding our religious differences. . . . Human freedoms are essentially subordinated to good morals and are safeguarded by them. A campaign for good morals is not an infringement upon freedom, but a preparation for the enjoyment of true freedom.[1]

We have already discussed at some length this theory of democracy—that "freedom" is not the right to do as we please, so long as we do not injure others, but only the right to do what we are told is "right." This view is utterly at variance with the American concept of democracy as enunciated in the Declaration

[1] Thomas J. Fitzgerald, "NODL States Its Case," *America*, June 1, 1957, p. 280. This article is reprinted by Harold C. Gardiner, *Catholic Viewpoint on Censorship* (Garden City, Hanover House, 1958), pp. 179-84.

of Independence and the Constitution, and as traditionally understood. The claim that Americanism and comstockery, now joined in holy matrimony, can go hand in hand down the rose-covered path to Christian virtue represents a failure on the part of those who would bless this union to comprehend what either religion or constitutional government is about.

As far as questions of economic pressures and boycotts are concerned, discussion of these had best be postponed until the facts relating to the motion picture industry have been put on the record. In this chapter, therefore, we shall be concerned with only two aspects of the fight against comic books, magazines, and paperbound books. The first of these is the question of the relation between these publications and juvenile delinquency. The second is the actual psychological value of the so-called objectionable literature.

The casual reader might easily believe, from various statements in the press, that antisocial acts and bad reading are inseparable. J. Edgar Hoover himself has said that "the increase in the number of sex crimes is due precisely to sex literature madly presented in certain magazines. Filthy literature is the great moral wrecker. It is creating criminals faster than jails can be built." [2]

In 1954 the convention of the National Council of Juvenile Courts declared:

> There is a growing realization that such foul publications, through their distribution to children and youth and their extensive encouragement to read them, contribute to the breakdown of the moral sense in children which today is causing an increase in juvenile delinquency throughout the Nation and is often responsible for adult criminality. . . .[3]

In this regard Fredric Wertham makes the following charges against the comics: (1) they create an openness to temptation;

[2] Quoted by Thomas J. Fitzgerald, "The Menace of Indecent Literature," *The Ave Maria,* Sept. 22, 1956. Reprints are available.

[3] *Ibid.*

(2) they arouse unwholesome fantasies; (3) they suggest desires which are criminal or even sexually abnormal; (4) they supply the necessary rationalizations for these desires; (5) they suggest possible ways to express them; and (6) they may be just convincing enough to lead the delicately balanced individual into crime.[4]

Some writers on juvenile delinquency would have us believe that there is a proportional relationship between the number of "foul" publications a child or adolescent reads and the number and type of crimes he commits. Most sociologists and psychologists are agreed that this is not true. Other critics of objectionable comics, magazines, and paperbound books say that these publications are a major ingredient in the development of juvenile delinquency. Even this claim has been contested. One of the safest evaluations of the comics was made by Richard Clendenen, executive director of the Senate subcommittee on juvenile delinquency:

Q. How much of a factor do you think that the crime comic books play in juvenile delinquency?

A. As a minimum, the crime and horror comic books can have a definite contributing effect for the youngster who is highly vulnerable to juvenile delinquency—in other words, for the youngster who is so unstable that his behavior tends to be shaped primarily by what is immediately suggested to him.

Q. Do they increase the violence of the crimes?

A. Well, they can suggest specific crimes. Take, for example, a kid who is extremely hostile and who is acting out his rebellion against his family. There are lots of ways to act out rebellion, and you and I probably act some of it out on the golf course. On the other hand, you can act out hostility and rebellion through hurting others or damaging property. The crime and horror comics can suggest violent means for acting out hostility. They do not, of course, produce the hostility. But they suggest and support and, in a sense, give sanction to expression of hostility through violence and crime.[5]

[4] Fredric Wertham, *Seduction of the Innocent* (New York, Rinehart, 1954), p. 118 *et passim.*

[5] *United States News & World Report,* Sept. 17, 1954, quoted in *The Reference Shelf,* vol. 28, no. 2 (New York, Wilson, 1956), pp. 8-9.

Robert Lindner, a psychoanalyst and at one time chief consultant to the Maryland State Board of Correction, reached the conclusion that the roots of juvenile delinquency are in modern American society itself, specifically in the cult of conformity which, he says, "is the clue to psychopathy and Mass Manhood":

> Seen in perspective the distress of modern youth takes on a new and different significance. . . . Banning comic books, censoring movies, closing television stations, "getting tough with them," encouraging the Boy Scout movement, increasing the police force, establishing curfews, corralling kids into churches, and advocating "positive thinking" will not help. What is necessary now is a drastic change in emphasis and direction on the part of our entire social organism.[6]

Men must cease to be automatons whose every impulse is controlled by social demands. Only thereby will the glory of youth be restored.

In a similar vein John H. Griffin asks, "Does not this banning, making literature the scapegoat, indicate only one thing: defeat within the home?" [7] And Norman St. John-Stevas notices that Sheldon and Eleanor Glueck, after painstaking research, have concluded that reading is not a significant cause of juvenile delinquency: "They showed in fact that delinquent children read much less than the law-abiding." [8]

[6] Robert Lindner, "Adolescents in Mutiny," *Pocket Book Magazine,* 1955, no. 3, quoted in *The Reference Shelf, op. cit.,* pp. 34-35.

[7] John H. Griffin, "Prude and the Lewd," *The Nation,* Nov. 5, 1955, p. 384.

[8] Norman St. John-Stevas, *Obscenity and the Law* (London, Secker & Warburg, 1956), p. 200; see also Harrison Salisbury, *The Shook-up Generation* (New York, Harper, 1958), pp. 68, 146-47; Marshall B. Clinard, "Secondary Community Influences and Juvenile Delinquency," in Sheldon Glueck, *The Problem of Delinquency* (Boston, Houghton Mifflin, 1959); and Virginia P. Held, "What Can We Do about 'J.D.'?" *The Reporter,* Aug. 20, 1959. A standard work is Sheldon and Eleanor Glueck, *Unraveling Juvenile Delinquency* (Cambridge, Harvard, 1950). This has appeared in a popularized version, containing some interesting generalizations: *Delinquents in the Making* (New York, Harper, 1952).

Stymied by the lack of scientific evidence, the censorial critic is forced to play his hunches:

> The sociologist expresses professional doubt about the causal line between bad reading and immorality; he finds insufficient evidence for it. The common-sense view asserts that the causal line is sufficiently established by the nature, content, tendency, etc., of the literature itself. At least a strong presumption is thus created; and it furnishes reason for action, until—and maybe after—all the Ph.D. theses, pro and con, have been written.[9]

Thorough, systematic research is needed into the effects of reading upon children and adolescents. Morris L. Ernst has noted that such a study would be an important contribution to the debate over control.[10] McKeon, Merton, and Gellhorn put such a study at the top of their list of recommended projects.[11] This is not to say, however, that we are in total darkness about the influence of comic books on young readers. Katherine M. Wolfe and Marjorie Fiske have suggested that the comics help to strengthen the ego of the normal child by projection (in the funny-animal stage), by identification (in the invincible-hero stage), and, later, by making him face existing situations (in the true-comics stage). The abnormal child, however, may become obsessively concerned with a host of powerful and relatively tangible comic-book heroes who fill his exacerbated need for an ideal figure.[12] This analysis helps to explain why most children are not overtly demoralized by comics, while for some children they become a destructive passion. It also helps to explain the

[9] John Courtney Murray, "The Bad Arguments Intelligent Men Make," *America,* Nov. 3, 1956, p. 122; quoted by Gardiner, *op. cit.,* p. 169.

[10] Morris L. Ernst, "The Battle of the Ban," *The Saturday Review,* Apr. 19, 1958, p. 39.

[11] Richard McKeon, Robert K. Merton, and Walter Gellhorn, *The Freedom to Read* (New York, Bowker, 1957), pp. 71-72.

[12] Katherine M. Wolfe and Marjorie Fiske, "Why They Read Comics," in Wilbur Schramm, *The Process and Effects of Mass Communication* (Urbana, University of Illinois, 1954), pp. 48-49.

popularity of the Nietzschean figures who hurl themselves through the pages of some of our most widely read comic books.

It is generally agreed that objectionable comic books, magazines, and paperbound books do not in themselves cause juvenile delinquency. They have described criminal methods which some children may have seen fit to copy, but such occasions are rare. The principal indictment against this literature must be that it tends to reinforce other, more basic antisocial influences on those who make it their chief reading material. Recent investigations into the effects of mass media on adults have shown that opinions and values are not overturned by what people hear or see, but that these attitudes can be modified or strengthened. Children may well be more amenable to such modifications as a result of reading than are their elders, but the creation of new opinions or values is not so easily brought about.

We live in a period when every major political event and every economic and social problem contributes to the devaluation of honesty and mercy, of love, respect, and fair play. Not all the millions of comics and crime stories printed in the past and yet to be published will demoralize this country so much as have the two World Wars, the international anarchy that has existed since 1945, and the serious dislocations in our economic and social organization of human life. The lack of political stability at home and abroad; the burgeoning of social and political suspicion and fear; the increasing demand for total national allegiance and obedience in the face of a world-wide ideological and political split; the insecurities of a post-capitalist economy based on the frantic creation of artificial needs—these and other tragic developments have made a normal, peaceful, constructive life exceedingly difficult, if not impossible. And as one result, violence has become normative in the West. Not since the late Middle Ages and the period of the great religious wars have men been so destitute of humanitarian feeling and of the desire for a life lived in mutual respect and personal responsibility.

There is a threat to our society, but it does not come from literature. It arises from a warped sense of values which renders human life sterile. It comes from an intolerable amalgamation of

political, social, and economic problems, all of which have made a shambles of our lives simply because we shirked them when they first confronted us. Now we are terrified at the prospect of having to solve them full-grown.

Children and adults alike live in a social, political, and economic maelstrom which fosters hostilities, frustrations, and insatiable longings—overtly expressed in dull conformity or in violence and crime. In such a world, objectionable comic books, magazines, and paperbound books, whose effects are barely perceptible in the normal reader and intensely gratifying only to the emotionally unstable, are hardly a major threat. They are at most a symptom; and all the lists, certificates, and warnings of the NODL and of decent literature commissions can do no more than postpone for a brief while the hour of reckoning.

These arguments will not, of course, deter the controllers. For them, objectionable literature is still objectionable, even if it is relatively impotent. The advocates of control, were they to decide that there is no great need to become upset about comic books, would still prefer to ban some of them—and perhaps all of them.[13]

Since most hard-cover volumes are rather expensive, paperbound reprints are for many adult readers the only easy contact with contemporary and classical literature. The NODL would not have them read anything more challenging than Marcelle Maurette's *Anastasia,* Aesop's *Fables,* Defoe's *Robinson Crusoe,* Giovanni Guareschi's *Don Camillo and His Flock,* and Lew Wallace's *Ben Hur.* Many highly respected modern novels, including John O'Hara's *Ten North Frederick,* Françoise Sagan's *Bonjour Tristesse,* Hemingway's *To Have and Have Not,* Erskine Caldwell's *Tobacco Road* and *God's Little Acre,* and Émile Zola's *Nana* would be unavailable in inexpensive editions. This is, as Justice Frankfurter said, burning the house to roast the pig.

But even assuming this incendiarism were desirable, how

[13] See Robert Warshaw, "Paul, the Horror Comics, and Dr. Wertham," in Bernard Rosenberg and David Manning White, *Mass Culture: The Popular Arts in America* (Glencoe, Ill., Free Press, 1957), esp. pp. 204-10.

could it be effected? It has been found, for example, that the comic-book industry is incapable of cleaning out its own Augean stable. Others must do the job, and it might best be done by legally designated authorities in accordance with city ordinances or state and national statutes. The banning of comics to adults as well as children would be silly; but if we ban them only to children, how shall we insure that dealers and children alike adhere to the law? Will it be necessary for young people to prove that they are over twenty-one in order to buy a comic book? A black market will be the result. And will the comic-book laws be enforced as casually as are the laws dealing with the sale of alcohol to minors? A complication here is that comic books can be bootlegged from child to child; alcohol can be consumed only once.

Even if comics could be banned in accordance with the Constitution, and banned effectively, an important cultural consideration would still remain. The effect of such legislation, or of a highly successful campaign by the controllers, would be to deprive the young of a psychic escape hatch. Children become interested in crime and horror comics when they have reached that level of development at which such literature is meaningful to them, when it satisfies both their perception of the external world and their own psychological needs.

In many ways these contemporary tales of adventure have replaced the sagas of exploration and conquest that were so familiar to previous generations. Our perspective has narrowed from the expanses of nature to the chasms of cities, and from hostile natural forces to crooks, gunmen, and (oddly enough) the law. Crime and horror stories are the emotional outlets and testing grounds of our urbanized, denaturalized children. Junior will never meet a bear in the forest, but there is always a chance that his house will be robbed. Just as children of the past hurled all the power of their frustrations against an imaginary bear, so children today release against the comic-book villains all the hostile energy that city life inhibits. To block the release of childhood tensions by means of literature geared to them may only result in a far greater surge of juvenile crime than this

country has ever known, for, deprived of imaginary outlets, the children may be forced to real action. The reading of "objectionable" comic books, in short, may actually be a *preventative* of juvenile delinquency.

A thorough, efficient ban on objectionable comics, magazines, and paperbound books will endanger the young in another way: it will over-protect them. Reality has many faces, and many of them are grotesque. The literature of the nineteenth century, excellent though it was, suffered from the great fault that it locked life inside the parlor or library and refused to acknowledge the existence of anything outside. It was, in general, a literature of antimacassars, tea-sipping, and genteel moral lapses. This was one reason for the distinctiveness of Dickens, Hardy, and Conrad in England; Flaubert and Zola in France; Melville and Twain in America; and Dostoevski in Russia. These few dared to show the seamy, violent, disturbing sides of human life.

In our day the writer of fiction has swung so far from the parlor and the library that one doubts that he knows of their existence. Ours is certainly not a literature of protectiveness: nothing is too venerable or too secret to go unmentioned. This is in large part a reaction against the Victorian Age; and like all reactions, it sometimes goes too far and creates a new kind of unreality. A number of best sellers appear to be written on the assumption that the only significant letters in the English language are E, S, and X, suitably rearranged.[14] The ideal of our modern literature, however, is certainly worth pursuing. Crime, lust, bloodshed, hate, greed, cruelty, and selfishness are threads of life. The child had better have a little knowledge of them lest he be so startled when he comes of age that he will be unable to deal with them. In its rush to be daring, contemporary fiction may sometimes become absurd, but there is reason to expect that many novelists will find a balance. Unless the comstocks drive

[14] See Clifton Fadiman, "Party of One: What's Happened to Sex?" *Holiday*, Aug., 1959; and Dorothy Parker, "Sex—without the Asterisks," *Esquire*, Oct., 1958.

us back into a moral kindergarten, we may hope for a literature which is not only honest, but relevant to our deepest needs.

The magazines pose a different problem. They attract a good many readers; they offer some off-color amusement and—more significantly—give safe, vicarious satisfaction to socially unacceptable desires. Perhaps their most important function, however, is the expression of those romantic ideals which have been gradually disappearing from American hard-cover fiction. Perfect beauty or virility, "true" love, and noble adventure are the basic underlying themes of much of this literature. Brushing away the overlays of sexuality and morbidity, we find at the core of these stories an appeal for romantic unreality, for a world peopled by Byronic heroes and heroines who, as the saying goes, "have lived," but who cannot easily be found in the contemporary world.

Much of this literature is repellent. It can also be enervating, but for that matter so can too slavish a reading of the *Reader's Digest, The Saturday Evening Post, The Ladies' Home Journal, The Nation,* or the *American Mercury.* The pulp magazines undoubtedly satisfy the psychic needs of many people. If they are not in exquisite taste, they do occasionally say things that polite society might well hear and ponder. And it is not impossible that in an age of mechanized and stereotyped personalities, the ideals of romanticism may serve as a much needed corrective.

But what of such magazines as are plainly erotic, single-mindedly devoted to the stimulation of lascivious thoughts and desires? We can defend their right to exist unhampered without reveling in them. As Stanley Kauffmann has declared: "There is no viable, no *moral* middle-ground in this matter. Opponents of restriction on the artist's freedom are forced to fight also for the freedom of the pornographer. Anything less is to appease the beast by feeding him scraps that only keep him alive to attack you. You may throw him garbage, but it strengthens him, nevertheless." [15]

[15] Stanley Kauffman, "'Lady Chatterley' at Last," *The New Republic,* May 25, 1959, p. 14.

But what will happen, the controllers cry, when children get their hands on these magazines? Will not their morals be corrupted? No, not unless they have been well prepared for corruption. They will more likely be bored. And once they see what these magazines contain, the aura of secrecy that customarily surrounds this literature will be broken. By trying to hide the contents, the controllers and censors only make them more appealing and seductive. The secret is always what captures people's curiosity; it never lives up to their expectations.

As Heywood Broun wrote in the last chapter of his book on Anthony Comstock:

> The great threat to the young and pure in heart is not what they read, but what they don't read. To forbid is to underline. Suppression is almost always a compliment and often one wholly undeserved. Great writers have lived and died, and human conduct has been affected by them to the extent perhaps of a finger-nail's thickness; and yet many blandly assume that the veriest hack can trip and overthrow mankind by using a few vulgar words set down with neither skill nor imagination.
>
> It is not lustful thoughts which mar human personality, but only the sense of shame. Comstock spread shame about very widely and it was a force much more debilitating than any exotic notions which might have come from the books he seized.[16]

To summarize, there seem to be at least eight major reasons for opposing the control of comic books, paperbound books, and magazines as that control has been exercised by the NODL and decent literature commissions:

(1) There is no adequate evidence to prove that these publications, especially crime and horror comics, are causes, guides, or inducements to juvenile delinquency. Such intensive research as does exist tends to *dis*prove any causal relationship.

(2) Comic books and other types of literature which stress violence are indeed brutalizing influences, but they are merely symptoms of the general decline in humanistic values because of

[16] Heywood Broun and Margaret Leech, *Anthony Comstock, Roundsman of the Lord* (New York, Boni, 1927), p. 270.

political, economic, and social upheavals. To ban them would in no way affect the causes of the cult of violence.

(3) To keep from adults all literature which is deemed objectionable for children would be to confine the adult population within the intellectual and emotional limitations of the child.

(4) The nature of comic books would make the job of keeping them out of the hands of the young exceedingly difficult.

(5) Since comics are for some youngsters a vital means of psychological release, banning them might well cause an increase in overt antisocial behavior.

(6) A ban on paperbound books would over-protect the young and lead them to view the world in a deceptively rosy light.

(7) The pulp magazines offer psychic comfort by their romanticism, and such literature is a valuable antidote to existing social values in our industrial, depersonalized society.

(8) As far as the salacious magazines are concerned, adolescents and their elders will be better off by having free access to them. To ban them is to honor them, perhaps unjustifiably. Secrecy only makes them more enticing.

Chapter IX. Comstockery in Dreamland

I wish I hadn't broke that dish,
I wish I was a movie-star,
I wish a lot of things, I wish
That life was like the movies are.
A. P. Herbert

From the realm of the printed word, we turn now to that of the spoken word and the projected image. Just as the comic books, pulp magazines, and paperbound books pose special problems for the censors and controllers, so too do the motion pictures. In this chapter we shall examine the general nature and forms of motion picture regulation. In Chapter X we shall evaluate the specific comstockery that now exists in this medium.

The story is told of the potential moviegoer who called a theater to ask at what time the next show began. "When can you make it?" the manager inquired.

The motion picture industry is not in quite so enfeebled a state as this; but compared with its former days of glory, its present condition leaves much to be desired. Whereas in 1947 approximately 75 million Americans trooped into the theaters every week, by 1957 the average was down nearly one-half—to slightly more than 42 million. In 1930 there were 23,000 movie houses in this country; in early 1958 there were only 17,809, and these included drive-ins. Approximately 6000 of these theaters were losing money.[1]

This crisis is commonly attributed to the inroads of television, and it is certainly true that many people would rather sit at home and see old movies than go to the neighborhood theater

[1] Arthur Mayer, "Hollywood: Save the Flowers," *The Saturday Review,* Mar. 29, 1958, pp. 11-12, 31.

to see new ones. But Hollywood's troubles are also the result of the federal government's success in breaking up the monopolistic structure of film distribution by requiring the major companies to surrender their control of motion picture theaters.[2] And the motion picture industry had become so accustomed to enormous audiences that it inevitably regarded any drop in attendance, even if to a more normal level, as a major cataclysm.[3]

A crisis does exist, however, and Hollywood has responded in a number of ways. It has turned over to television a sizable quantity of old films, which now appear and reappear on matinees and midnight shows. The sprawling production plants which were once the mecca of every tourist to California are being chopped up and sold to prospective builders of housing projects. Instead of re-creating Europe or Asia on the West Coast, movie makers have been taking advantage of lower labor costs abroad by filming major portions of their most important pictures overseas. They have also countered the intimate, miniature quality of television by preparing great extravaganzas which create new dramatic effects by means of new visual and sound techniques. At the same time, Hollywood has apparently decided that its rival can be an ally; it is happily keeping its actors, actresses, and facilities busy making films for television.[4]

Finally, the motion picture industry has embraced more tightly than ever the determination to give people what it thinks they want. "I don't want to make artistic flops," one producer announced. "I make things that I think will make money." [5] On the surface this sounds admirably democratic, but in practice it turns the industry into a handmaiden of the juvenile mind.

[2] *Ibid.*, p. 12.

[3] Hollis Alpert, "The Big Change in Hollywood: Ten Years of Trouble," *The Saturday Review*, Dec. 21, 1957, p. 9.

[4] See William K. Zinsser, *Seen Any Good Movies Lately?* (Garden City, Doubleday, 1958); also Ernest Havemann, "The Business of Show Business: Riches or Ruin," *Life*, Dec. 22, 1958; Ben Hecht, "Elegy for Wonderland," *Esquire*, Mar., 1959; Arthur Mayer, "From Bernhardt to Bardot," *The Saturday Review*, June 27, 1959; and "The Film: Survey of the Craft and Its Problems," *The Saturday Review*, Dec. 20, 1958.

[5] Ross Hunter, maker of *Imitation of Life*, quoted in the New York *Times*, June 23, 1959, p. 38.

Hollywood is now directing its main efforts to that segment of the population which flocks to see *Baby Face Nelson, Jailhouse Rock, Invasion of the Saucer Men,* and *I Was a Teen-age Werewolf.* For young adults who find these unpalatable, a vast number of gushy romances are offered as palliatives.

Movie makers do occasionally turn out mature and significant films; some of these are the work of independent producers, but the established studios have their share as well. The overwhelming proportion of Holywood's creations, however, are insipid if not downright silly. Indeed, the production of a good film seems to be in contravention of the existing norms.

> Studios now in competition with television believe that they cannot afford to sink a million or two dollars into a picture that will only have limited appeal. All pictures, consequently, must strive for the biggest possible box office draw. They must all be something to which, the producer likes to think, the "whole family" can go. One producer made the philosophy explicit to Lillian Ross: "The public wants pictures like *Ma and Pa Kettle.* I say make pictures the public wants. . . . Biggest box-office draws are pictures catering to the intelligence of the twelve-year-old." [6]

Let us keep in mind these economic and cultural aspects of the motion picture industry as we consider movie censorship and control.

The first concerted attempt to censor motion pictures occurred in New York City in 1909. The city's motion picture theaters had been closed because of their bad physical condition and because of the objectionable films they were wont to show. To bring the theaters back to life while safeguarding the community's morals, a volunteer citizens' committee was established under the name of the National Board of Censorship; in 1914 it changed its name to the National Board of Review. Members of the Board viewed the pictures to be shown in New Yoik City and condemned those which they found to be unfit for public

[6] "Hollywood Movies and the Church," *Social Action,* Nov., 1952, p. 19.

presentation. The Board's power was informal; it depended upon the willingness of local officials and the film industry to accept its judgments. Despite its name, the Board was in no sense national. Its care and discrimination made its judgments respected in many areas outside New York City, but its decisions were in no way binding upon those areas.

The movies still affronted a great many people. In the decade after the Board was established, there were repeated demands for strict governmental censorship. In response to these demands, Pennsylvania enacted a censorship law in 1911. Ohio and Kansas followed suit two years later. In 1916 a New York State censorship bill was vetoed by the governor, but the legislature continued to express its concern over motion pictures and conducted an official investigation of them the following year. In 1915 a federal motion picture commission was proposed to Congress. The idea was rejected, but it was continually revived, and this threat was an additional pressure on the motion picture producers to clean their own houses.

Two years after the New York legislature's investigation, the National Association of the Motion Picture Industry, disturbed by the barrage of unfavorable publicity, voted for self-censorship. The Association soon adopted a code of standards, including a list of subjects and situations which producers should refrain from portraying. Among these were illicit love affairs, white slavery, nakedness, and exotic dances. To direct the application of this code, an organization called the Motion Picture Producers and Distributors of America was set up; it represented over 80 per cent of all producers and was headed by President Harding's postmaster general, Will H. Hays. Under Hays' early leadership, however, the industry remained in a confused state, and movies were frequently off-color. Frederick Lewis Allen ably describes the situation:

> The producers of one picture advertised "brilliant men, beautiful jazz babies, champagne baths, midnight revels, petting parties in the purple dawn, all ending in one terrific smashing climax that makes you gasp"; the venders of another promised "neckers, petters, white kisses, red

kisses, pleasure-mad daughters, sensation-craving mothers . . . the truth —bold, naked, sensational." Seldom did the films offer as much as these advertisements promised, but there was enough in some of them to cause a sixteen-year-old girl . . . to testify, "Those pictures with hot love-making in them, they make girls and boys sitting together want to get up and walk out, go off somewhere, you know. Once I walked out with a boy before the picture was even over. We took a ride. But my friend, she all the time had to get up and go out with her boy friend."

Allen describes the reign of Mr. Hays:

"This industry must have," said [Hays] before the Los Angeles Chamber of Commerce, "toward that sacred thing, the mind of a child, toward that clean virgin thing, that unmarked slate, the same responsibility, the same care about the impressions made upon it, that the best clergyman or the most inspired teacher of youth would have." The result of Mr. Hays's labors in behalf of the unmarked slate was to make the moral ending as obligatory as in the confession magazines, to smear over sexy pictures with pious platitudes, and to blacklist for motion-picture production many a fine novel and play which, because of its very honesty, might be construed as seriously or intelligently questioning the traditional sex ethics of the small town. Mr. Hays, being something of a genius, managed to keep the churchmen at bay. Whenever the threats of censorship began to become ominous he would promulgate a new series of moral commandments for the producers to follow. Yet of the practical effects of his supervision it is perhaps enough to say that the quotations given above all date from the period of his dictatorship. Giving lip-service to the old code, the movies diligently and with consummate vulgarity publicized the new.[7]

In 1926 another public outcry against the movies developed, and Congressman William D. Upshaw of Georgia repeated the old proposal of a federal motion picture commission. President Coolidge opposed Upshaw's bill, however, and it was shelved. Other bills were soon introduced, only to meet a similar fate. Finally, in 1930 the Hays Office decided that it had to do some-

[7] Frederick Lewis Allen, *Only Yesterday* (New York, Harper, 1931), ch. 5, pp. 101-103.

thing really constructive. With much fanfare, it promulgated the Motion Picture Code.[8]

The Code of 1930 was substantially the same as the revised Code, established in 1956, which guides Hollywood today. Among the salient differences are the following warnings which were contained in the first Code but omitted from the second:

Illegal drug traffic must never be presented.
The use of liquor in American life, when not required by the plot or for proper characterization, will not be shown.
White slavery shall not be treated.
Miscegenation (sex relationship between the white and black races) is forbidden.
Pointed profanity (this includes the words God, Lord, Jesus, Christ—unless used reverently—Hell, S.O.B., damn, Gawd), or every other profane or vulgar expression however used is forbidden.[9]

The Code Administration had the power to fine those members of the Motion Picture Association who violated the Code's provisions.

Both the Code of 1930 and the present one are clearly hampered by being too vague and general.

The trouble with the code is the trouble with obscenity statutes. Its mandates are shot through with generalities; its social policy is one of hypocrisy and hush-hush; its criteria are predicated on the suscepti-

[8] See Howard T. Lewis, *The Motion Picture Industry* (New York, Van Nostrand, 1933), ch. 12; Morris L. Ernst and Pare Lorentz, *Censored: The Private Life of the Movie* (New York, Cape and Smith, 1930); Gilbert Seldes, *The Movies Come from America* (New York, Scribner, 1937); Ruth A. Inglis, *Freedom of the Movies* (Chicago, University of Chicago, 1947); Will H. Hays, *Memoirs* (Garden City, Doubleday, 1955); and Raymond Moley, *The Hays Office* (Indianapolis, Bobbs-Merrill, 1945). An excellent pictorial history of the movies, which does not let the illustrations run away with the text, is Richard Griffith and Arthur Mayer, *The Movies* (New York, Simon and Schuster, 1957).

[9] This provision gave rise to an English rhyme:

"This film is under official ban
Because the hero utters 'damn.'
Well, we will go to see another,
And watch a gangster shoot his mother."

bilities of morons; its effect is one of forcible suppression; it lends itself readily to abuse; and above all, it creates a viciously false picture of life.

No more conclusive evidence can be adduced of the confusion bred by the equivocations of the Code than the fact that during the last four years [1936-1939] the Code Administration has handed down 26,808 opinions, "interpreting" the provisions of the Code.[10]

Because of its moral and artistic unreality, the Code inevitably creates violations:

What is striking psychologically about the Code is that almost all of the subjects declared taboo or to be accorded careful treatment are the very ones which attract people in our society. . . . Virtually every producer knows that this is so and hence is always tempted to break the Code or come as close to breaking it as the Association, the censorship boards, various social groups, and his own conscience will permit. A picture which is daring in terms of the Code's standards is likely to be a box-office success. The Code, then, seeks to express the conventional standards of our society; the productions reflect the Code but not too faithfully.[11]

As we shall see, this tension between Code and producer prompted several groups to create their own role in the movies—that of controller.

To understand the problems which developed for the industry after the promulgation of the Code, we must turn back for a moment and trace the fate of the movies in the courts. In 1915, two years after the Ohio movie censorship law was passed, it came before the United States Supreme Court. Justice Joseph McKenna summarized the Court's attitude in validating the Ohio statute:

[10] Morris L. Ernst and Alexander Lindey, *The Censor Marches On* (New York, Doubleday, Doran, 1940), p. 89.

[11] Leonard W. Doob, *Public Opinion and Propaganda* (New York, Holt, 1948), p. 510.

It cannot be put out of view that the exhibition of motion pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as a part of the press of the country or as organs of public opinion.[12]

The Court thus opened wide the door for the states and municipalities to censor movies as they saw fit. They were not slow to grasp the opportunity. Before long the country was dotted by countless state and local censorship boards.

Yet the movies were still untamed. The Code was being stretched and even circumvented, especially during the depression, when movie producers sought desperately to entice customers by giving them what the Code said they should not have. Rev. Avery Dulles, S.J., expresses the belief then evidently held by many observers: "It was obvious that the Hays Office could not accomplish its purpose without outside support." [13]

It was under these conditions that the Roman Catholic Legion of Decency was formed in 1934. Catholics had become very much interested in the motion picture industry and its effects upon American morals, just as they were later to develop a concern for the problems of mass literature. An early result of this interest was the 1930 Code, drafted by two Roman Catholics —Rev. Daniel A. Lord, S.J., and Martin Quigley, the editor of a motion picture trade paper. The formation of the Legion extended Catholic influence, and in the same year another Catholic, Joseph Breen, became Code administrator. Writing of the birth of the Legion, Hays declares: "Humanly speaking, it was the moral force of the Catholic Church that gave the *coup de grâce* to Code-breakers. And it was the concrete program of the Legion of Decency, quickly taken up by other groups, that spearheaded the public demand for Code enforcement." [14]

[12] Quoted by William L. Chenery, *Freedom of the Press* (New York, Harcourt, Brace, 1955), p. 201.

[13] Avery Dulles, *The Legion of Decency* (New York, America Press, 1956), p. 3.

[14] Quoted, *ibid.*, p. 4.

The Legion immediately adopted a pledge which, in a briefer form, is still administered once a year in each parish church in America. Catholics are free to recite it or to refrain from so doing. The pledge now reads:

I condemn indecent and immoral motion pictures, and those which glorify crime and criminals. I promise to do all that I can to strengthen public opinion against the production of indecent and immoral films, and to unite with all who protest against them. I acknowledge my obligation to form a right conscience about pictures that are dangerous to my moral life. As a member of the Legion of Decency, I pledge myself to remain away from them. I promise, further, to stay away altogether from places of amusement which show them as a matter of policy.[15]

Even if Catholics do not recite this pledge, however, they are morally bound by it. Father Gardiner explains:

. . . the pledge . . . does no more than specify and recall an obligation that Catholics (and indeed any Christians) would be faced with, even if there were no Legion of Decency—the obligation, namely, not to attend motion pictures or any other type of entertainment that is offensive to Christian morality.[16]

The Legion also adopted a rating system designed to inform its members of the character of current movies. Before December, 1957, the Legion employed a set of four categories: *A-1*, morally unobjectionable for general patronage; *A-2*, morally unobjectionable for adults; *B*, morally objectionable in part for all; and *C*, condemned. A fifth classification, rarely used, identified films which, "while not morally offensive, require some analysis and explanation as a protection to the uninformed against wrong interpretations and false conclusions."[17] *Martin Luther*, for example, was placed in this classification.

[15] Quoted, *ibid.*, pp. 9-10.

[16] Harold C. Gardiner, *Catholic Viewpoint on Censorship* (Garden City, Hanover House, 1958), pp. 91-92.

[17] This and the following quotations are from Legion publications cited in *ibid.*, pp. 94-95.

In December, 1957, a new set of categories was adopted. Films are now classified under five possible headings:

A-1 films are held to be morally sound for most people.

A-2 films are unobjectionable for adolescents and adults. This category was explained by the Legion as a service to teenagers: "In keeping with the sound principles of modern Catholic educational psychology it seems desirable that the Legion aid the adolescent in . . . [the] quest for more mature movie-subjects and thereby contribute to his intellectual and emotional maturation. To this end the new A-2 classification has been adopted; it is hoped that this classification, while providing the necessary reasonable moral controls upon the adolescent, will at the same time aid him in his 'growing up.' "

A-3 films are unobjectionable only for adults. This category is identical with the former category A-2, whose scope was difficult to define: "These are films which in themselves are morally harmless but which, because of subject-matter or treatment, require maturity and experience if one is to witness them without danger of moral harm. While no definite age limit can be established for this group, the judgment of parents, pastors and teachers would be helpful in determining the decision in individual cases."

B films are those which the Legion decides are morally objectionable in part for adults as well as for adolescents and children. "Some of them are disapproved because they contain sequences likely to arouse the sensual passions—ardent love scenes, indecent dress, licentious dances, etc. In other cases a picture is so classified because of an objectionable theme: approval of divorce, for example, or of mercy killing or suicide." [18] Some Catholics might be able to attend these films without harm; but even for these people, repeated exposure could be dangerous and should be avoided. "Out of desire to do the better thing, a loyal member of the Legion of Decency will generally prefer to avoid B pictures altogether. Unless he has some real necessity for going, he will not want to give his patronage to producers

[18] Dulles, *op. cit.*, p. 19.

and distributors who are dragging down the nation's moral standards." [19]

C films are "so bad that the average person seeing [them] would rarely escape a severe temptation to sin, usually a sin against the sixth commandment." [20] These pictures are to be avoided at all cost.

Finally, the new rating system retains the seldom used classification for films involving special problems.

The ratings of individual films are decided upon by the combined efforts of Catholic priests and Catholic laywomen. Here are some sample classifications which appeared in the Denver *Register,* one of the most influential Catholic newspapers in the nation, on August 31, 1958:

In class A-1 (morally unobjectionable for general patronage) —*All at Sea . . . Across the Bridge . . . Attack of the Puppet People . . . Beast of Budapest . . . Bridge on the River Kwai . . . Dragoon Wells Massacre . . . Gift of Love . . . I Accuse . . . It Conquered the World . . . No Time for Sergeants . . . The Old Man and the Sea . . . Tin Star . . . The World Was His Jury.*

In Class A-2 (morally unobjectionable for adults and adolescents)—*Attila . . . Blonde Blackmailer . . . Emergency Hospital . . . Hatfull of Rain . . . Kill Her Gently . . . Kings Go Forth . . . My Man Godfrey . . . The Return of Dracula . . . A Time to Love and a Time to Die . . . Vampire . . . Vertigo . . . Witness for the Prosecution.*

In class A-3 (morally unobjectionable for adults)—*Bonjour Tristesse . . . Cat on a Hot Tin Roof . . . A Certain Smile . . . Desire under the Elms . . . Frankenstein . . . Fraulein . . . The Goddess . . . The High Cost of Loving . . . The Long Hot Summer . . . Marjorie Morningstar . . . Peyton Place . . . South Pacific . . . Teacher's Pet . . . The Vikings.*

[19] *Ibid.,* p. 21.

[20] *Ibid.,* pp. 18-19. According to the Roman Catholic and Lutheran understanding of the Ten Commandments, the sixth commandment is "Thou shalt not commit adultery" (Ex. 20:14). For the Greek Orthodox and the Reformed Churches, as well as for Judaism, this is the seventh commandment.

In class B (morally objectionable in part for all)—*Baby Face Nelson . . . The Bride and the Beast . . . Confessions of Felix Krull . . . Don't Go Near the Water . . . A Farewell to Arms . . . God's Little Acre . . . Hell Divers . . . High School Confidential . . . Invasion of the Saucer Men . . . Island in the Sun . . . I Was a Teen-age Frankenstein . . . Lafayette Escadrille . . . Mister Cory . . . Pajama Game . . . Pal Joey . . . Razzia . . . Silk Stockings . . . The Sweet Smell of Success . . . The Sun Also Rises . . . This Angry Ape . . . Three Faces of Eve . . . Young and Wild.*

In class C (condemned)—*And God Created Woman . . . Baby Doll . . . Carnival in Flanders . . . Game of Love . . . Light across the Street . . . Manon . . . Miss Julie . . . Nana . . . Seven Deadly Sins . . . Sins of the Borgias . . . She Shoulda Said No . . . French Line . . . One Summer of Happiness . . . Woman of Rome.*

Later lists put *The Big Fisherman, The Diary of Anne Frank, Green Mansions, Hercules, The Ten Commandments,* and *Pather Panchali* in A-1; *The Naked and the Dead, The Nun's Story, Porgy and Bess, Say One for Me,* and *Woman Obsessed* in A-2; *Auntie Mame, Compulsion, The Defiant Ones, Gigi, He Who Must Die, Imitation of Life, I Want to Live, Lonely Hearts, Me and the Colonel, Separate Tables, The Seventh Seal,* and *Wild Strawberries* in A-3; *Middle of the Night, Rally Round the Flag, Boys,* and *Room at the Top* in B; and *No Orchids for Miss Blandish* and *Son of Sinbad* in C.

In the special classification the Legion placed *Adam and Eve,* explaining: "The sensational exploitation in advertising tends to negate the spiritual motivation of the film-maker and restricts the viewing to a special audience." *The Case of Dr. Laurent* was similarly rated because "this film presents the case of the psychoprophylactic method of childbirth, which is more popularly known as 'natural childbirth.' This medical theme, handled with discretion and good taste, can have significant education value for adults and older adolescents. The subject matter itself is too sacred, private and personal for indiscriminate showing in entertainment motion picture theaters."

From its start in 1934, the Legion grew quickly in prestige and power. Its judgments carried increasing authority, largely as a result of the powerful and far-flung organization it developed, but also because the Code Administration was not averse to having the Legion as an ally.[21] The Legion's objections to certain movies resulted from time to time in the pre-release alteration of those movies. A loose but effective system of cooperation grew up among compliant producers, the fine-wielding Code Administration, and the Legion.

Then, in 1950, a huge hole was torn in the neat fabric of informal control. In that year the United States Supreme Court held the ownership or operation of theaters by motion picture producers to be a violation of the antitrust laws and ordered that control over production and exhibition be in separate hands. So long as the major producers operated nearly all the theaters, only their films could be widely shown. These producers always sought the approval of the Code Administration, which in turn was responsive to Legion of Decency verdicts. Independent producers who wished to challenge the Code were hamstrung.

The Court's decision resulted in the creation of a great number of independent theaters which could show any motion picture by any producer, with or without the Code's seal of approval. In 1953 *The Moon Is Blue,* which was denied the Code's paternal blessing and was condemned by the Legion, was shown in 7000 motion picture theaters. *I Am a Camera* and *The Man with the Golden Arm,* other pictures which were refused the Code's seal, were also shown widely. All three films were well received by the public.[22]

In 1952 another heavy blow struck movie censorship. Foreign films, which do not come under the supervision of the Code, can be attacked only by the Legion and other private groups, or by

[21] See Hays, *op. cit.,* pp. 150-51.

[22] "How Do You See the Movies? As Entertainment . . . and Offensive at Times, or as a Candid Art?" *Newsweek,* Aug. 8, 1955, p. 51. See also Milton Lehman, "Who Censors Our Movies?" *Look,* Apr. 6, 1954; Gerald E. Bunker, "Movies and Morals," Harvard *Crimson,* Feb. 12, 1957; and John McCarthy, "New Needs for the Legion of Decency," *Catholic Digest,* May, 1954.

state or local censorship boards. Such attacks were made upon *The Miracle,* an Italian film which was highly offensive to the American hierarchy of the Roman Catholic Church. A long squabble developed; the film was banned by the licensing authorities in New York City and New York State; and the case was finally brought before the United States Supreme Court in *Joseph Burstyn, Inc. v. Wilson.* Speaking for the Court, Justice Tom C. Clark said:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.

Recalling Justice McKenna's 1915 decision upholding the Ohio censorship law, Justice Clark declared: "To the extent that language [in that opinion] . . . is out of harmony with the views here set forth, we no longer adhere to it." The Court thus brought motion pictures under the protection of the guaranties of freedom of the press. It also held that a movie cannot be banned on the charge of sacrilege, as *The Miracle* had been. The ban on the film was lifted.[23]

At one time or other, Kansas, Maryland, New York, Ohio, Pennsylvania, Virginia, Florida, Louisiana, and Massachusetts have had state motion picture censorship laws. Courts in Kansas and Pennsylvania declared the laws of those states unconstitutional, while the United States Supreme Court has invalidated the Ohio law. The Florida and Louisiana statutes have not been implemented by the appointment of censors.

The Massachusetts law, unlike the rest, applied only to motion pictures shown on Sunday. A state referendum had rejected prior censorship of motion pictures by the state; but the legislature, arguing that the voters had meant only weekday

[23] Chenery, *op. cit.,* p. 203. See also Arthur Knight, "Hollywood Takes on Narcotics," *The Saturday Review,* Dec. 17, 1955.

censorship, enacted a law to censor films on Sundays. The law provided that the mayor of a city may, at his own discretion, grant or deny "a license to hold on the Lord's day a public entertainment, in keeping with the character of the day and not inconsistent with its due observance," provided that the "entertainment" is also "approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance."

Brattle Films of Cambridge, which had been showing *Miss Julie* on weekdays, asked the Cambridge commissioner for approval and the city manager for a license. The firm's requests were turned down. Receiving no assistance from the Superior Court of Middlesex County, Brattle Films appealed to the Supreme Judicial Court of Massachusetts. On July 6, 1955, the court found that the refusal of written approval and of a license "constitutes a prior restraint of the freedom and rights" of Brattle Films and violates the First and Fourteenth Amendments and Article 16 of the Declaration of Rights of the Constitution of Massachusetts.[24] Speaking for the Court, Judge Raymond S. Wilkins declared:

> That the present controversy concerns exhibitions on only one day a week, and that day Sunday, does not seem to us to alter the governing rules of law. It is unthinkable that there is a power, absent as to secular days, to require the submission to advance scrutiny by governmental authority of newspapers to be published on Sunday, of sermons to be preached on Sunday, or public addresses to be made on Sunday.[25]

The tendency now seems to be toward the voiding of all state motion picture censorship laws. While state legislators occasionally introduce more severe laws or attempt to replace statutes killed by the courts, their efforts have born paltry fruits. In 1959 only four states had active and official censorship bodies:

[24] Article 16, as amended, reads as follows: "The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged."

[25] *Brattle Films, Inc. v. Commissioner of Public Safety,* 127 North Eastern Reporter, 891-93.

Kansas (which had a new law), Maryland, New York, and Virginia.[26] There has been no such trend, however, with regard to local censorship ordinances, and the invalidation of the state laws has been hotly contested. The future is not yet clear.

Even among the leaders of the supposedly monolithic Roman Catholic Church, we find different opinions on the subject of state censorship. On the one hand, Father Gardiner quotes Archbishop John T. McNicholas of Cincinnati, who, as chairman of the (Catholic) Episcopal Committee on Motion Pictures, in 1936 stated before a committee of the U.S. House of Representatives: "The Legion of Decency sees in legislative measures not a means of securing a wholesome screen, but rather a grave danger of political censorship. One law may lead to another. The result in all probability will give us a bureaucracy or final court of morals for motion pictures." Father Gardiner then comments:

> Furthermore, since those early days when the Legion came out against federal censorship, the bishops of the United States, in general, have been singularly devoid of active co-operation in the establishment or retention of individual state censorship boards. One very obvious reason for this is that if the Church, which upholds certain moral principles that are not commonly accepted in this country (divorce, birth control, and the like), were to be vigorous in demanding the continuance of state censor boards, it would be open to a veritable flood of attacks that it was trying to impose through the co-operation of legally constituted organs its own morality on the American public at large. One of the best refutations of the suspicion that the bishops of the United States are trying to effect such an imposition is precisely their general indifference to the existence of state censorship. It was exactly because political censorship, whether federal or state, was realized to be ineffectual or dangerous, or both, that the Legion was called into being.[27]

[26] The extent of the powers of state censorship boards was limited by the Supreme Court in *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, which dealt with the film version of *Lady Chatterley's Lover*. The Court held that a motion picture cannot be banned simply because it treats favorably a subject of which society disapproves. The six opinions produced by the nine judges evinced clearly the great variety of attitudes toward film censorship which characterizes contemporary thought on the subject.

[27] Gardiner, *op. cit.*, p. 88. A similar attitude is expressed by William P. Clancy, "Freedom of the Screen," *The Commonweal*, Feb. 19, 1954.

On the other hand, Michael J. Buckley, writing in *The Catholic World,* acknowledges that "state censorship of indecent movies is regrettable," but concludes that "the harm these movies do is even more regrettable." Hence, state censorship is a distasteful necessity:

> . . . a democracy can only be established upon reasoning men, freed from the enslavement of their surroundings and their passions. The youth of the United States have a right to this education in freedom. No other agency has the right to prevent it. Indecent movies, though, actively militate against this education in freedom, and as such provide a genuine menace to a self-governing people. Consequently, these shows must be cleaned up and kept clean.[28]

Many Catholics recognize that state censorship of motion pictures is now highly improbable. But what alternatives remain? One immediate response of the hierarchy has been that the Legion of Decency must become more vital and positive. The Bishop of Albany called in 1957 for the formation of local lay study groups, guided by the Legion, in which Catholics would learn to discriminate for themselves between good and bad entertainment. Two years later the Legion announced a campaign to foster this goal.[29] Pope Pius XII, in his lengthy encyclical *Miranda Prorsus,* expressed his warm approval of such organizations as the Legion and urged that Catholics be taught in such a way that they "perceive the need to lend willingly . . . their united and effective support." [30]

The cry that the Legion must become more active has also generated criticism. Many non-Catholics protest that the Church is attempting to apply pressure upon the motion picture industry and that such pressure is undemocratic. *The Commonweal* has taken on this challenge:

[28] Michael J. Buckley, "State Censorship of Movies," *The Catholic World,* Oct., 1954, p. 25.

[29] See William A. Scully, "The Movies: a Positive Plan," *America,* Mar. 30, 1957; "National Legion of Decency Plans to Support High Quality Movies," Boston *Pilot,* Mar. 21, 1959, p. 2.

[30] *Miranda Prorsus,* Sept. 8, 1957 (New York, America Press, 1958), p 15.

Liberals . . . talk about "freedom" as though it existed in some vacuum, cut off from the rough and tumble world of the pressure and politics of men. They fall into a kind of political angelism . . . forgetting that, in the concrete, liberty is exercised through such mundane channels as the number of tickets that some minority may buy for a movie it likes or refuses to buy for a movie it disapproves of.

The freedom of the artist is a noble thing, but so is the freedom of any group to influence, as best it may, the course of public events. In a free society the answer to pressure we don't like is not to denounce its use or its right to exist (as liberals usually do in the case of religious pressure) but to organize counter-pressure. This is how democracy works.[31]

In the early 1950s, the whole problem of movie censorship and control was complicated by the demands of several producers, led by Samuel Goldwyn, that the Code be revised. Goldwyn warned that unless the Code was "brought reasonably up to date, the tendency to bypass it, which has already begun, will increase." [32]

This suggestion aroused considerable opposition. One of Goldwyn's chief critics was Martin Quigley, an author of the Code, who declared that Goldwyn had allied himself with "that cabal of clamor against the Code by those who seek the destruction of all restraints and standards in motion picture entertainment." He added that "the Code document consists primarily of the application of moral principles, based on the Ten Commandments," so that to demand a revision is "tantamount to calling for a revision of the Ten Commandments." [33] Quigley later expanded his argument:

The average moviegoer is precisely the same person he was twenty-four years ago with respect to his obligations to the moral law. The Code clearly distinguishes between matters of convention, fashion, and taste, which change from time to time, as distinguished from matters of moral principle, which do not change. In the case of the former the regulations

[31] "Catholics and the Movies," *The Commonweal,* June 3, 1955, p. 219.

[32] Quoted in "Revising the Code," *The Commonweal,* Jan. 22, 1954, p. 392.

[33] Quoted, *ibid.,* p. 392.

of the Code have been changed from time to time in the past and doubtlessly will be changed from time to time in the future. With respect to the moral principles underlying the essential purposes, these principles as expressed in the Code have not been changed and will not properly be subject to change, now or at any time in the future.[34]

Nevertheless, in December, 1956, a new Code was published. It begins with three general principles:

1. No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience shall never be thrown to the side of crime, wrong-doing, evil or sin.
2. Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented.
3. Law—divine, natural or human—shall not be ridiculed, nor shall sympathy be created for its violation.

It is significant that, in the third principle, the word "divine" is a new addition. This division of three types of law is derived from Question 91, Articles 2-5, of the *Summa Theologica* of Thomas Aquinas. When categories from Thomistic philosophy are used in a document that is administered by a Roman Catholic and was originally written by two other Catholics, it seems difficult to argue that the Code expresses the consensus of morality of Protestant America.

The new Code makes concessions on the subjects of drug addiction, liquor, and miscegenation, but adds bans on blasphemy, mercy killing, double entendre, detailed physical violence, and insults to races, religions, and nationalities. Other stipulations in the new Code include:

I:6 There shall be no scenes of law-enforcing officers dying at the hands of criminals, unless such scenes are absolutely necessary to the plot.

I:8d Mercy killing shall never be made to seem right or permissible.

[34] Letter from Martin Quigley to the editors in *The Commonweal,* Feb. 26, 1954, p. 528.

III:1 Adultery and illicit sex, sometimes necessary plot material, shall not be explicitly treated, nor shall they be justified or made to seem right and permissible.

III:4 The subject of abortion shall be discouraged, shall never be more than suggested, and when referred to shall be condemned. It must never be treated lightly or made the subject of comedy. Abortion shall never be shown explicitly or by inference, and a story must not indicate that an abortion has been performed. The word "abortion" shall not be used.

III:6 Sex perversion or any inference of it is forbidden.

VIII:2 Ministers of religion, or persons posing as such, shall not be portrayed as comic characters or as villains so as to cast disrespect on religion.

In its commentary on these rules, the Code warns, with regard to I:6 and I:8d: "The treatment of crimes against the law must not . . . make criminals seem heroic and justified." Explaining the items under III, it cautions that nothing should be presented in a film that will disparage marriage as an institution. As for VIII:2, the Code argues ingeniously:

> The reason why ministers of religion may not be portrayed as comic characters or as villains so as to cast disrespect on religion is simply because the attitude taken toward them may easily become the attitude taken toward religion in general. Religion is lowered in the minds of the audience because of the lowering of the audience's respect for a minister.

It is worth noting that this rule grants to the minister so special a role that to treat him with anything but respect is almost sacrilegious. This role is not a Protestant concept; it is unique to Roman Catholic theology.

The moral value of rule III:1 has come under searching, if infrequent, criticism within the industry. Before World War II, one company was producing *They Knew What They Wanted.* This picture violated the Code, since it ended with the showing of forgiveness to those who had committed adultery. After one

long and fruitless conference, Charles Laughton, who was a bystander at the discussion, asked Code Administrator Joseph Breen, "Do I understand, Mr. Breen, that the Code does not recognize the New Testament?" There was a long pause. Finally Breen replied, "That would be a rough way of saying it, Mr. Laughton." [35]

The Code, Quigley has assured us, embodies the Ten Commandments. It appears to have no room, however, for the Sermon on the Mount, which denounces legalism in morals and demands that human beings accept and respond to each other in a spirit of love and mercy and brotherhood.

These and other aspects of the revised Code offer strong support for Quigley's boast that the motion picture industry "has reaffirmed and preserved inviolate the basic moral principles and provisions of the earlier Code." [36] On the other hand, Tom F. Driver, a contributing editor of *The Christian Century,* lamented:

> Missing from the Motion Picture Production Code is any mention of honesty and responsibility in unique situations (either on the part of film producers or of characters in the films). Yet these are the *sine qua non* of all genuine morality. The code is permeated with the type of legalistic thinking which assumes that the right and the wrong thing exist independent of particular situations; hence, that the morality of films may be discussed in abstraction from the practices and social pressures which actually exist for a particular man. The immediacy of decision does not seem to be involved. For that reason the code actually has little or nothing to do with the problem of morality as such. And *any* attempt to modernize it will seem futile, for as it is now predicated it by-passes, as a matter of principle, the crucial elements of an ethic of responsibility.[37]

[35] Robert Ardrey, "Hollywood's Fall into Virtue," *The Reporter,* Feb. 21, 1957, p. 17.

[36] Quoted in "The New Code Appraised," *America,* Jan. 5, 1957, p. 384. For a profile of Quigley, see John McCarthy, "Hollywood's Conscience," *Catholic Digest,* Aug., 1954.

[37] Tom F. Driver, "The New Movie Code," *The Christian Century,* Jan. 2, 1957, p. 6.

Patrick Murphy Malin, executive director of the American Civil Liberties Union, described the new Code as more harsh than the old one. Noting the effects of the new Code on classics, Malin argued:

Dostoevski's *Crime and Punishment* would be barred from the movies because it vividly describes the methods of crime . . . Mozart's *Don Giovanni* would run afoul of the rule that "passion should be treated in such manner as not to stimulate the baser emotions"; and Euripides' *Bacchae* would be in film trouble because it does not "carefully and respectfully" handle religious ceremonies.[38]

The Motion Picture Production Code has thus been softened in some respects but strengthened in others. It remains a powerful, though not omnipotent, foe of free expression in the movies.

Its sibling, the National Legion of Decency, is the most influential controller of films today and is not diffident in reminding motion picture producers of its power.

Father Gardiner attempts to minimize this power:

The Legion does not exercise prior censorship. The vast, overwhelming number of the films it reviews are already in the pipeline to the general public and will be released, frequently enough before the Legion's ratings get to public attention (a situation the Legion tries valiantly to cope with). If the Legion could, within the framework of our law, prevent objectionable films from getting to the Catholic public, it would undoubtedly do so. But this is an academic question, and in the present climate of legal decisions and certainly for the foreseeable future, the Legion will be limited to what it was actually set up to do —review and classify pictures. It cannot be denied that from time to time the Legion is *asked* (it can make no demands) by producers to give an opinion on a script in process; changes have occasionally been made when a producer has come for advice. But this is certainly no more "prior censorship" than would be the guidance asked for and taken by a young writer who requested an Ernest Hemingway to read and criticize his manuscript.[39]

[38] Letter to Eric Johnston, president of the Motion Picture Association of America, summarized in the ACLU's "Weekly Bulletin," no. 1906, June 10, 1957.

[39] Gardiner, *op. cit.*, pp. 105-6.

Gardiner's use of Hemingway as an example is unfortunate. A Hemingway cannot determine the financial success of the novel which is submitted to him. The Legion, on the other hand, knows that one of its most potent weapons is its ability to keep many Catholics away from a motion picture to which it gives a poor rating. Were it not for this economic power, the Legion would be of little significance to non-Catholic moviegoers.

It has been said that when the Legion gives a film a bad rating it is acting after the fashion of a pressure group. Father Gardiner prefers to call the Legion an interest group, concerned only with the welfare of its own charges:

> It may fairly be said that the Legion would be magnificently achieving its goal simply if every Catholic in the United States did not attend C and B movies, even if such films continued to be shown in considerable numbers. Of course producers and exhibitors would not look smilingly on the loss of a Catholic audience running into the millions, and changes in the quality of films would come about, as they have, but that is the producers' worry, not the Legion's. The producers have put their wares before the "censorship of the market"; if they lose some of the market, the next move is up to them.[40]

Many producers, wary of the complex structure of censorship and nervous about box-office receipts, have made the "next move" first. Erskine Caldwell, for example, is apparently unaware that "the Legion does not exercise prior censorship." Discussing the film version of *God's Little Acre,* he admitted, "Yes, we did cut a few feet of the movie in deference to the Legion of Decency. They were going to give it a C-rating. C for Condemned." [41]

[40] *Ibid.,* pp. 134-35.

[41] Interview with Alfred Friendly, Jr., Harvard *Crimson,* May 6, 1958, p. 2.

Chapter X. "Morality" and the Search for Meaning

> Let those responsible for making films draw on the sources from which the highest gifts flow. Let them master the Gospel teaching, and make themselves familiar with the Church's traditional doctrine on the truths of life, on happiness and virtue, on sorrow and sin, on body and soul, on social problems and human desires. They will thence derive new and excellent insights and inspirations, and will feel themselves stirred by a fresh enthusiasm to produce works of lasting value.
>
> Pius XII, *Miranda Prorsus*

The Motion Picture Production Code and the dicta of the Legion of Decency—both of which seek to guide the movie industry by Roman Catholic precepts and to ban or penalize films which stray from that path—are vulnerable to criticism on many counts. Specific rules of the Code are often in absurd contradiction to the daily experienced realities of life. By insisting that one of our most effectively persuasive art forms adhere to an unrealistic view of life, the Code is inevitably threatening our self-understanding and hence our ability to endure as a democracy in an anarchistic world.

The Legion of Decency carries high into battle the same banner of unreality. The legalistic morality it champions is not only at variance with daily experience; it is also devoid of that compassion which the New Testament itself stresses and which is embraced by many devout and able shepherds of the Church in other parts of the world. The motion picture industry, as it yields to Legion pressure, systematically presents self-righteous fantasy as moral truth. The possible effects of this deception

upon America's integrity and survival are, to say the least, disquieting.

But particular rules of the Code and particular verdicts of the Legion, however irrational and dangerous, are merely surface symptoms. The sickness lies deeper—in the very concept of morality and spirituality to which the Code and the Legion subscribe, and on which their judgments are based.

When the French motion picture version of *Lady Chatterley's Lover* was imported into this country, the Legion greeted it coldly:

> This film, in its development and solution of the plot, condones adultery. As such it constitutes an unconscionable attack upon a fundamental tenet of Judaeo-Christian morality. This is all the more reprehensible when such an attack comes through a mass media [*sic*] of entertainment which in our American society is devoid of reasonable safeguards for the young and impressionable.[1]

Needless to say, the film was placed in class C (condemned).

The Legion of Decency has appointed itself a guardian of America's morals. As in this case, it passes judgment on specific behavior—the act of adultery, the act of condoning adultery. It announces precisely what behavior is to be considered moral and what is not. At the same time, however, it presents morality as religious: morals are not "twentieth-century American," but "Judaeo-Christian." The Code is similarly presented as (in Mr. Quigley's words), the "application of moral principles, based on the Ten Commandments."

What is this elusive "morality," which is at once specific behavior and religious value? In our search for it, let us start with some conventional definitions:

Morals are judgments—good, bad, or a mixture of the two—by which society chooses to label specific human actions. Morals never exist in the absolute: they are intricately related to the particular social situations in which they develop. Morals

[1] Quoted in the Denver *Register*, Aug. 30, 1959, p. 4.

thus change continuously—and often dramatically—from place to place and almost from day to day.

Ethics is the philosophy of morals, the general study which analyzes human morals and evaluates them. Ethics is a kind of supreme court of judicature over morals. Ethical values are general tendencies of morals that are found throughout the centuries in most societies with relatively little change. They are longer-lasting than morals, but they are neither permanent nor absolute.

Religion is harder to define. One simple and profound formula is suggested by Paul Tillich: *religion is concern with that which has ultimate validity.* It is an absolute commitment of oneself to a personal search for "the meaning of life":

> Being religious is being unconditionally concerned, whether this concern expresses itself in secular or (in the narrower sense) religious forms. . . . You cannot reach God by the work of right thinking or by a sacrifice of the intellect or by a submission to strange authorities, such as the doctrines of the church and the Bible. You cannot, and you are not even asked to try it. Neither works of piety nor works of morality nor works of the intellect establish unity with God. They follow from this unity, but they do not make it. They even prevent it if you try to reach it through them.[2]

How, then, are morals, ethics, and religion related to one another? This is an extremely difficult question; and Christianity, as we have known it in this country, has all too often answered it in a very superficial way.

It was the custom in the nineteenth century—and it is still the custom today in some segments of Christianity—to equate religion with ethics. Jesus of Nazareth was held to be the supreme teacher, who revealed the proper way to live; the true Christian is one who follows his words, especially the Sermon on the Mount. This is all very well; but if we rely on this standard,

[2] Paul Tillich, *The Protestant Era* (Chicago, University of Chicago, 1948), p. xv.

these are no true Christians at all. Who among us believes that, if the Soviet Union should attack the United States, we have a religious obligation to abandon our airfields and rocket sites, and run home to tell our wives to prepare dinners for the Soviet troops? This would be the Christian thing to do—but who will do it? Some critics of religion have used such ethical dilemmas to indict religion as a farce. But such a critic is accepting as a fact the equation of religion with ethics. To replace religion, he would generally present the Sermon on the Mount in a new, "realistic" guise, shorn of theological concepts and supported by considerations of long-range rational utility.

At the other extreme, Soren Kierkegaard used to speak of the "teleological suspension of the ethical"—the subordination of the ethical categories of human life to ultimate divine realities. (He saw Abraham's preparations to sacrifice his only son, Isaac, as the expression *par excellence* of this principle.) Religion, said Kierkegaard, must be exalted far above ethics; in no way can God be viewed as the supreme ethical category. But this view turns a serious search for meaning into a chaotic guessing-game about the nature of the ultimate divine realities. We must seek out a middle ground between these extremes.

Surely ethics is a part of religion. If, as Tillich has asserted, religion is the inescapable ground of every activity, then it must embrace ethics along with everything else. But far more than ethics is involved in the quest for absolute meaning. Ethics is a component of religion and should not be equated with it. At the same time, it is an important component; it cannot be eliminated from religion without destroying the whole.

Religion is concerned with ethics but *not* with morals. The peculiar forms of behavior which a society requires are not within religion's proper domain. As Reinhold Niebuhr has observed:

> Practically all forms of religious faith tend to confuse the final truth to which they are [committed] with some relative and historical statement of that truth, and to identify the ultimate good with some contingent expression of it in history. No religion can really be true if it does not embody within its final truth the realization of the fact that all historic

forms of truth and goodness are not only imperfect but contain some positive contradiction to the final truth.[8]

Religion must test morals against its own standards of ultimate ethical value. Churches and other religious institutions may criticize morals, but they must not advocate moral codes. They must discriminate between ethical valuations and mere social conventions, lest what is ultimate be confused with what is relative, and the ethics of a church be only the calcified remains of the social norms of an earlier epoch.

Ethical values, being generalizations based on centuries of human experience, are far more flexible than morals. But even ethical values have limits beyond which they may appear rigid. Since the contingencies of life are infinitely varied, a conflict among ethical values is inescapable. An ethical man is bound, for example, never to kill or allow killing; he is also bound to do everything in his power to relieve suffering. But if he has an incurably ill and pain-ridden friend or relative, he cannot fulfill both of these ethical values. If he follows one, he automatically violates the other.

Again, both friendship and a sense of social responsibility are ethical virtues. What should a man do, then, if his best friend confides that he has committed a serious crime? Should he remain silent for the sake of friendship, and ignore his obligations as a citizen; or should he expose his friend and betray a personal trust? Or again, a political leader in high office may believe that violence is unethical and so be a fervent opponent of war; yet the responsibilities of his position may compel him to work actively for military preparedness. And if war is declared on his nation by another state, what should he do? If he retaliates, even in self-defense, he is violating the ethical imperative. If he does not retaliate, he is betraying the trust inherent in his office and perhaps endangering the lives of his countrymen.

[8] Reinhold Niebuhr, "The Place of Christianity in a Democracy," in Elkan Allan, *Living Opinion: A Collection of Talks from the B.B.C.'s Third Programme* (London, Hutchinson, n.d.), p. 59.

These are complex ethical dilemmas of the deepest significance—an inextricable interaction of virtue and sinfulness, innocence and guilt. And not only do ethical commandments conflict among themselves; ethical and moral demands are in constant collision. Since most men are desperate for their neighbors' approval, the more obvious moral demands are likely to prevail. When all ethical values are abandoned to expediency, human action is even more closely interwoven with error and guilt.

No man, therefore, can be a fully ethical individual as his religion defines ethics. Guilt and virtue are inextricably bound together; in every attempt to be ethical, man sins. Hence, as Tillich has said, it is impossible "to unite a *sensitive* and a *good* conscience." The religious man must accept such sin as inevitable. He must develop a "transmoral conscience"—a conscience that rises above the moral and ethical rigidities of good and bad. This happens in religion "by the acceptance of the divine grace which breaks through the realm of law and creates a joyful conscience; in depth psychology by the acceptance of one's own conflicts when looking at them and suffering under their ugliness without an attempt to suppress them and to hide them from one's self." [4]

We have already seen the relationship between morals and ethics. In this concept of the transmoral conscience, we begin to understand the relationship between ethics and religion. The transmoral conscience affirms the existence of ethical categories but denies their absoluteness. Ethics are important, but in man's relations to God something more is needed, and this something more cannot be the result of any human attempt to do what is good.

Here, then, are the essential facets of religion. But what of the "morality" so jealously guarded by the Legion and the Code? Obsessed with the judgment of specific actions, which is no part of religion's concern, and indifferent to both ethical

[4] Paul Tillich, "The Transmoral Conscience," in *op. cit.*, p. 149.

values and the ultimate concerns of religion, this "morality" parades itself as religious and claims its authority on that basis. If this claim is accepted at face value, "morality" is a contradiction in terms. Religious in nature, but devoid of religious content, it cancels itself out.

The "morality" of the Code and the Legion is, in fact, no more than legalistic moralizing, based on standards which are neither universal nor religious. For the legalist, what is right is right, and what is wrong is wrong. But life is not so simple; and the more the Code and the Legion try to moralize the content of the motion pictures, the more they will render them defective mirrors whose images of life are hopelessly distorted. Their effect is thus to obscure the ethical implications of real behavior and to impede the unconditioned search for meaning, which is the essence of religious experience.

Supporters of the Code frequently claim that it expresses the moral heritage of Western civilization—a heritage which Catholics, Protestants, and Jews hold in common. (The Legion has occasionally tried to garb its judgments in the same universalistic terms.) Raymond Moley tells us, for example:

> It is important to note that the basic moral principles upon which Quigley and Father Lord worked in creating a systematic code did not involve matters of theology, concerning which there are differences among the religions of the Western world. The basic moral prohibitions in all these religions go back to the Ten Commandments. The moral principles observed in drafting the Code were based upon the Ten Commandments. For that reason, the Code, while originally drafted by members of the Catholic religion, was universally acceptable by the members of all Western religions. There was no other common ground upon which all who were concerned could stand. So the Code suggests the basic moral unity of Western civilization.[5]

Such an understanding of the relationship between religion and morals is extremely naïve. While it is true that Western

[5] Raymond Moley, *The Hays Office* (Indianapolis, Bobbs-Merrill, 1945), p. 71.

religions regard the Ten Commandments as an important part of their religious heritage, agreement ends there. When the Commandments are applied to specific issues, a great many conflicts arise because the methods of application used by Protestants and Catholics differ widely.

The Roman Catholic Church has developed a body of moral law, according to which general ethical principles are systematically applied to specific human situations. This law is, as it were, the moral treasury of the Church. Earlier generations have contributed the capital, and later generations need only to plow the interest back into the business. Protestants, on the other hand, believe that each ethical and moral problem must be worked out afresh in terms of the factors immediately involved. The dicta of the past are to be examined, but they are not binding. The general principles are relatively certain, but their applications are always unique.

The "basic moral prohibitions . . . based upon the Ten Commandments," which Moley describes as "universally acceptable," are therefore not sufficient to serve as a "common ground." The philosophies by which they are applied to contemporary behavior are of central importance, and these differ radically among the Western religions: Catholic ethics is legalistic, while Protestant ethics tends to be pragmatic. The provisions of the Code, however, are clearly legalistic. The philosophy of the Roman Catholic Church is dominant in the Motion Picture Production Code.

We should hardly expect the verdicts of the Legion to be other than legalistic, but one salient virtue should be noted in its favor. The Legion's standards are in many ways oppressive, but they are also marked by a great deal of wisdom. The Legion does not haphazardly ban this or that film because it contains material which a number of priests or laywomen dislike. There must be a specific, sound basis in Catholic moral theology for disapproving of a film. Hence, the Legion is lenient with motion pictures which a great many private citizens are only too eager to condemn. In particular, Protestants, because of the un-

systematic character of their ethics, often mix personal taste with ethics and condemn as conducive to vice that which is basically harmless. In short, for all its power, the Legion has displayed remarkable restraint. Few Protestant organizations, wielding the same power, would make such moderate controllers.

Chapter XI. Lest We Offend

> The broadcasting industry takes much credit for . . . censoring itself, a policy it feels is in keeping with the spirit of the First Amendment. But the code by which television is censored is not a moral standard; it contains no definition of pornography, nor any test of obscenity. Like the old motion picture code it is simply a list of words, actions and ideas people have objected to. . . .
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> This is informal censorship, the total effect of which is that sex is censored by the more sexually unbalanced in the audience, brutality and sadism are exploited for profit, the public is secretly gulled by its government which is allowed to enforce the fiction that it is invariably correct and successful, and the most dramatic and interesting features of our civilization are ignored as controversial. The main motive behind this censorship is to deliver to a sponsor the largest audience of tranquillized millions that can be mustered.
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> Frank R. Pierson, *The New Republic,* March 30, 1959

On April 30, 1939, an event took place that was to have profound effects upon American life. It was to alter social patterns by enticing people to stay at home more. It was to endanger the motion picture industry by offering a more easily accessible form of entertainment. It was to create new public personalities. It was to alter the rules of political campaigns. It was to help to save a vice-presidential candidate and to build up and then ruin a demagogic United States senator. It was to bring into every dwelling place a new means of communication, one which could be used with great power for good or evil.

In contrast to such notable accomplishments its origins were far from spectacular. Compared with its later mass audiences, relatively few people participated on that day in April, 1939, when the first television broadcast on a regular service basis was

seen in America. And the impact of this event was immediately softened by World War II, which required that American industry concentrate its attention on other matters. With the cessation of hostilities, however, the interest of scientists and manufacturers in the new medium increased rapidly. By 1958 there had been a number of new technical developments, including color television. There had also been a great increase in popular interest: by 1958, approximately fifty million television sets were in use in America, and programs were being transmitted by 526 television stations.

The new medium has combined sight and sound to present new experiences to Americans in their homes. Yet it has difficulty achieving the dramatic force of either radio or motion pictures. Radio has made the most of its power to affect human beings through only one of their senses—their hearing. Not required to concern itself with pretty faces, attractive settings, and novel visual effects, radio has been able to concentrate on what can be achieved solely by sound. The results have been memorable. Who can forget the impact of Orson Welles' dramatization of *The War of the Worlds* in 1938? Or Edward R. Murrow's famous broadcasts from war-scourged London, of which Archibald MacLeish has said:

> You burned the city of London in our houses and we felt the flames that burned it. You laid the dead of London at our doors and we knew the dead were our dead—were all men's dead—were mankind's dead—and ours. Without rhetoric, without dramatics, without more emotion than needed be, you destroyed the superstition of distance and of time—of difference and of time.[1]

Films, on the other hand, have been able to expand and to intensify the effects of the theater. They have ranged over vast areas of the natural world and have, at their best, plumbed the depths of human nature.

[1] Archibald MacLeish, William S. Paley, and Edward R. Murrow, *Three Talks on Freedom* (New York, Columbia Broadcasting System, 1941), pp. 7-8.

Television has been unable to compete with radio and motion pictures on their own terms. It is more versatile than radio in that it presents both sounds and visual images, but in practice it tends to emphasize one of these elements (usually sounds) at the expense of the other, or else to mix sight and sound in a confused way so that not much of an impression is made either aurally or visually. Gilbert Seldes has noted:

> The first triumph of radio was that it learned to live with itself, within its limitations, and that the good men in the profession never lamented the absence of the visual. . . . They learned to use evocative words, they worked the pictorial and inevitably fell into the merely picturesque —but one thing stood always to their credit: in the days of the motion picture and later in the days of the movie with sound, no one actually found radio lacking in power to stir the imagination, to deliver what it had to deliver fully and well.[2]

Television, on the other hand, as exemplified by the once famous *$64,000 Question,* has not been content to do one thing well. It has developed a dual nature:

> . . . a nature at war with itself, being partly entertainment as we knew it in the past (drama, variety, etc.) and partly a lower-keyed effort to engage (not necessarily to absorb) the attention of masses of people by having something going on—chatter, exhibition of personalities, games, and the like.[3]

At the same time, the physical limitations of television prevent it from encompassing vast areas as effectively as do motion pictures. The forte of television is its ability to create a sense of closeness, of community between performers and audience:

[2] Gilbert Seldes, *The Public Arts* (New York, Simon and Schuster, 1956), p. 69.

[3] *Ibid.,* p. 102.

For millions of people television has the same quality as a conversation with friends, almost the same quality as the mere presence of members of the family who needn't do anything exciting or unusual, so long as they are in the house, but who would be sorely missed if they departed.[4]

The so-called spectacular presentations, therefore, have had difficulty in living up to their promises. With a few rare exceptions, they have tried to cover too much territory and have succeeded only in proving once again that the larger the setting, the more difficult it is for viewers to feel that the performers are in the living room with them.

Within its limitations, however, television is a powerful medium. It gives a more realistic sense of immediacy than does radio. (We think, for example, of Frank Costello's appearance before the Kefauver committee in 1951, the Nixon broadcast in 1952, the Army-McCarthy hearings in 1954, and the *Face the Nation* interview with Premier Khrushchev in 1957.) Its documentaries, therefore, are usually to be preferred to radio's. Its dramas, being forced to concentrate on plot and character, rather than setting, can parallel the theater and films at their best. As a medium for the advertising of commercial goods, television is surpassed only by the newspapers. And, most important of all, it conveys visual images and sounds to people *in their homes:* it is always available.

This ease of accessibility of television, coupled with the passivity of the television audience, means that television can be especially powerful as a shaper of opinions and values. It can, to some degree, fashion a new reality if it so chooses. In a given year television can count on larger audiences than motion pictures ever had. Moreover, it has these audiences for a longer period of time. It is not uncommon for an adult to spend as many as thirty-five hours a week watching television.

With so much power implicit in the television medium, it is not surprising that various governmental, private, and commer-

[4] *Ibid.*

cial groups have sought to insure that this power is used in ways they consider right and proper. By the very nature of the medium, attempts to restrict what may be presented must take the form of prior restraints, for once an offensive word, gesture, or idea has been broadcast, the damage has been done. The prior restraints of radio and television are, however, quite different from those of the other media.

When our attention was directed to the NODL, the Churchmen's Commission, and the Legion of Decency it was possible to pinpoint the agencies which seek by extra-legal means to restrain what the mass media convey. When we deal with radio and television, however, such precision is impossible. The radio and television codes are less immediate in their effects than is the Motion Picture Production Code; they are applied to specific programs in a very casual way. As for the censors and controllers, a great number of firms and groups are interested in manipulating the contents of radio and television programs, but they cannot easily be pinned down. They are not organized, but operate on an informal basis. The public never knows they have been at work until it is too late: the cuts they have made from scripts cannot be restored. The control is thus elusive; indeed, audiences can be aware of so little of what is going on that the control of radio and television is perhaps the most sinister of all forms of control.

The experiences of television in this regard are based upon those of its predecessor, radio. To put television's situation in proper perspective, therefore, let us examine briefly the story of radio's dealings with federal government, industry codes, sponsors, and private pressure groups. We can then direct our attention to radio's more powerful ally.

The regulation of radio by the federal government resulted from the nature of the medium itself. The Federal Communications Commission was established in 1934 to assign a particular frequency to each radio station in order to prevent a number of stations from broadcasting on the same frequency, thus interfering in each other's programs. The number of frequencies is

limited, and the FCC was empowered to accept applications from potential broadcasters and to decide which applicants should be granted a license. As a check upon the licenses, Congress provided that a license must be renewed at least every three years. Since the standard of performance established by Congress is quite vague—licenses are granted and renewed in the "public interest, convenience and necessity"—the FCC has developed more precise standards of its own. New regulations are promulgated from time to time as circumstances require.

The FCC demands that program content be well balanced and offer something to all listeners. It also requires, in keeping with Section 315 of the Federal Communications Act, that whenever a radio station allows a candidate for public office to use its facilities, it must grant equal time to his opponents. In contrast to the broadcasting authorities in Great Britain, however, the FCC is not always scrupulous in its enforcement of this rule. In a presidential election, for example, only the Republican and Democratic candidates are granted equal time. The FCC also enforces the law, included in the Communications Act, that "no person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."

The most famous case in which the FCC promulgated a new standard, and at the same time clamped down on radio expression, occurred in 1941. When the Mayflower Broadcasting Company asked for the renewal of its license, the FCC noted that the company's station had broadcast for over a year "so-called editorials . . . urging the election of various candidates for political office or supporting one side or another of various questions in public controversy." The license was renewed only after station officials showed that no editorials had been broadcast after 1938 and promised that none would be broadcast in the future. "A truly free radio cannot be used to advocate the cause of the licensee," the Commission declared. "It cannot be used to support the candidacies of his friends. It cannot be used to support the principles he happens to regard most favorably.

In brief, the broadcaster cannot be an advocate." [5] (This position has since been modified: the FCC ruled in 1952 that a commentator may editorialize if he gives both sides of the issue.[6])

The pronouncements of the FCC, together with restrictions imposed by the Federal Communications Act of 1934 and its revisions, constitute the only governmental restraints upon the contents of radio broadcasting. They are potentially a formidable impediment to free expression. The American Civil Liberties Union has concluded, however, that "the inherent physical limitations of radio are such as to render the existence of some central supervisory body inevitable if chaos is to be averted on the air." [7] And the danger that the FCC could become a powerful censor is more theoretical than real. Its demand in 1959 that stations submit financial statements constituted a notable departure from its normal behavior, for the FCC has, on the whole, exercised its authority with great hesitation. The major restraints upon radio broadcasting come from individual stations, sponsors, networks, producers, and the radio code, rather than from any federal agency.

Each radio station has two major concerns: acquiring and holding sponsors, and doing nothing that might arouse the FCC. Consequently, station officials are exceedingly sensitive about the content of their programs. Controversial subjects, when they are not avoided entirely, are aired at times when there are relatively few listeners. Entertainment has almost always been deliberately neutral and inoffensive; today it is unbelievably innocuous. Before the advent of television, radio entertainment had character if not always depth. Certain programs, such as *Amos 'n' Andy, Baby Snooks, The Lux Radio Theater, Allen's Alley,* and *Town Meeting of the Air,* became as much a part of American life as hot dogs and baseball. With the arrival of tele-

[5] William L. Chenery, *Freedom of the Press* (New York, Harcourt, Brace, 1955), p. 226.

[6] See Harold E. Fellows, "Freedom of Expression on the Air," *The Annals of the American Academy of Political and Social Science,* July, 1955.

[7] "The Position of the American Civil Liberties Union," *The Reference Shelf,* vol. 12, no. 10 (New York, Wilson, 1939), p. 212.

vision, radio lost most of its regular audience, many of its best programs, and much of its character. While there have been sporadic attempts to inject new life into radio, it has continued to decline:

> It is like a teen-ager chewing gum, listening to the phonograph, talking on the telephone, studying, scratching, looking out the window, and all the time thinking about something else. But in radio, this undifferentiated tickling of the senses is stepped up to a mad assault.[8]

In its pursuit of the inoffensive, radio abandoned its dramatic impact:

> No longer was it family entertainment; no longer was it a basic means of communication on the national level; no longer was it *listened* to: it had become a kind of personal companion droning to one person at a time, a chattering, musical background to other activities. Radio found itself going where television could not go: in automobiles, to the beach, on the patio, to the sinkful of dirty dishes. . . . Now radio could be snapped on or off at any time, with no loss of continuity; now radio didn't have to be listened to, but merely tolerated in the background, to save a fidgety America from the horrors of silence.[9]

Radio has always been, and remains to this day, extremely sensitive about the broadcasting of unorthodox opinions. Whenever a speaker may possibly say something which the station believes is not in its own best interests, it can require the speaker to submit a copy of his remarks in advance. If he deviates from the approved text, he can be shut off the air, and the station can blame mechanical failures for the sudden silence. Broadcasters have also been known to refuse to sell time when such a refusal seemed expedient. The reason is often fear. Sponsors can cancel their contracts, demand public apologies, or refuse

[8] Frank R. Pierson, "Gabble, Gabble, Gabble," *The New Republic*, Feb. 9, 1959, p. 30.

[9] Donald P. Costello, "What Ever Happened to Radio?" *The Commonweal*, Jan. 9, 1959, p. 381.

to renew their contracts if a station allows the broadcast of something the sponsors do not like.

A number of specific examples of control of speech by radio stations or sponsors can easily be cited. In 1931 the well-known radio commentator H. V. Kaltenborn declared: "The best way to help the Russian people . . . is by granting recognition." The American Telephone and Telegraph Company thereafter denied Mr. Kaltenborn the use of its stations.[10] Father Charles E. Coughlin, who attracted considerable attention for his anti-Semitic utterances, was refused time by NBC and CBS. Norman Thomas, often the Socialist party candidate for president, has received similar treatment. During the 1940s there was considerable controversy over speeches by labor leaders, especially because of the provision in the radio code which forbade the selling of radio time for the discussion or dramatization of labor problems. Labor took its case to the FCC and was enabled to use radio's facilities. In February, 1957, Eric Sevareid's news broadcast for CBS Radio was canceled because he was "too editorial" in his treatment of the State Department's ban on the entry of American newsmen into Communist China. At the same time, the Roman Catholic clergyman Thurston N. Davis was denied the use of the time allotted for his CBS *Church of the Air* sermon because a planned sermon on several facets of Protestant-Catholic disagreement was too controversial. A year later NBC refused to allow Bob Jones, Jr., to condemn movements for "One World" on a religious program dealing with Old Testament stories.[11]

While deferring to the pressures from sponsors and other private groups, the broadcasting industries have sought to avoid the threat of governmental censorship by developing self-regula-

[10] "Censorship Charged by the ACLU," *The Reference Shelf,* vol. 12, no. 10 (New York, Wilson, 1939), p. 180.

[11] *The New Republic,* Feb 18, 1957, p. 3; Llewellyn White, *The American Radio, a Report on the Broadcasting Industry in the United States from the Commission on Freedom of the Press* (Chicago, University of Chicago, 1947); Thurston N. Davis, "A Time for Silence or a Time to Speak?" *America,* Mar. 16, 1957; and Bob Jones, Jr., "They Talked Themselves Out of It," *American Mercury,* Dec., 1958.

tory codes. In 1939 the National Association of Broadcasters announced a set of "Standards of Practice" outlining the Association's attitude toward various difficult types of radio programs:

In some two hundred words, it placed "crime-does-not-pay" and cowman breakfast-food serials for children in the context of "character development." "Education" was dismissed in five lines, "Religion" in four. "News" was to be "fair" and "accurate." . . . But the chef d'oeuvre was the section on "Controversial Public Issues." In some three hundred and fifty of the most carefully weighed words in the history of advertising double-talk the drafters made certain that broadcasters would eschew controversy as a plague-ridden orphan, feared by all, unwanted by the makers of soap and cigarettes.[12]

The radio code was revised in 1945, 1948, and 1954. There are significant differences in wording between the first and the later versions, but the general tenor of the code has remained more or less the same. Among the most interesting passages are the following, taken from the 1948 edition:

We Believe That American Broadcasting is a living symbol of democracy; a significant and necessary instrument for maintaining freedom of expression, as established by the First Amendment to the Constitution of the United States;

That its influence . . . is of such magnitude that the only proper measure of its responsibility is the common good of the whole people; . . .

That we should make full and ingenious use of man's store of knowledge, his talents and his skills and exercise critical and discerning judgment concerning all broadcasting operations to the end that we may, intelligently and sympathetically:

Observe the proprieties and customs of civilized society;
Respect the rights and sensitivities of all people;
Honor the sanctity of marriage and the home; [etc.] . . .

Discussions of controversial public issues should be presented on programs specifically intended for that purpose, and they should be clearly identified as such.

Broadcasting which reaches men of all creeds simultaneously should avoid attacks upon religion.

[12] White, *op. cit.*, p. 75.

Religious programs should be presented by responsible individuals, groups and organizations.

Religious programs should place emphasis on broad religious truths, excluding the presentation of controversial or partisan views not directly or necessarily related to religion or morality.

In determining the acceptability of any program containing any element of crime, horror or mystery, due consideration should be given to the possible effect on all members of the family.

If the techniques and methods of crime are presented it should be done in such a way as not to encourage imitation; criminals should be punished, specifically or by implication; and programs which tend to make the commission of crime attractive should not be permitted. . . .

Such programs should avoid the following subject matter:

Detailed presentation of brutal killings, torture or physical agony, horror, the use of supernatural or climactic incidents likely to terrify or excite unduly.

Episodes involving the kidnaping of children. . . .

Disrespectful portrayal of law enforcement; and characterization of officers of the law as stupid or ridiculous.

Suicide as a satisfactory solution to any problem.[13]

The 1954 version of the radio code added several new elements. It put special emphasis upon the ability, diligence, and honesty of news gatherers and disseminators, and upon the integrity of their sources of information. As for editorializing, it declared:

The reputation of a station for honesty and accuracy in editorializing depends upon willingness to expose its convictions to fair rebuttal.

The code also tried to narrow the number of persons who would have access to radio time for discussions of matters of public concern:

The broadcaster should limit participation in the presentation of public issues to those qualified, recognized, and properly identified groups or individuals whose opinions will assist the general public in reaching conclusions.

[13] National Association of Broadcasters, *Standards of Practice for American Broadcasters* (Washington, NAB, 1948).

Perhaps the most startling innovations in the new code involved the "advancement of education and culture" and the presentation of tragedy:

Because radio is an integral part of American life, there is inherent in radio broadcasting a continuing opportunity to enrich the experience of living through the advancement of education and culture.

The radio broadcaster in augmenting the educational and cultural influences of the home, the Church, schools, institutions of higher learning, and other entities devoted to education and culture:

Should be thoroughly conversant with the educational and cultural needs and aspirations of the community served;
Should cooperate with the responsible and accountable educational and cultural entities of the community to provide enlightenment of listeners;
Should engage in experimental efforts designed to advance the community's cultural and educational interests.

[With regard to dramatic programs] radio should reflect realistically the experience of living, in both its pleasant and tragic aspects, if it is to serve the listener honestly. Nevertheless it holds a concurrent obligation to provide programs which will encourage better adjustments to life.[14]

Unfortunately, this call for culture and dramatic realism can be implemented only with courage, and imagination. But these are in short supply.

No commercial station can afford to alienate any part of the public, as its profits depend upon showing a favorable response from as large an audience as possible. The effect is naturally stultifying. The continuity editor's pencil swings into action at the least glow of red, and the announcer stands ready to switch off a speaker instantly if he departs dangerously from his approved script.

The hypothetical listener whom they fear to offend is twelve years old and bristles with prejudices.[15]

[14] National Association of Radio and Television Broadcasters, *Standards of Practice for Radio Broadcasters of the United States of America* (Washington, NARTB, 1954).

[15] Mitchell Dawson, "Program Taboos," *The Reference Shelf,* vol. 12, no. 10 (New York, Wilson, 1939), p. 173.

The industry, faced with a disappearing audience and anxious to hold fast to every last listener, has ignored its own stated ideals.

The experiences of television with control by the federal government, individual stations, sponsors, agencies, producers, and an industry code have closely paralleled those of radio.

As in radio, each television station is dependent upon the FCC for its license to operate. It must also meet FCC standards, which are for the most part identical to those applied to radio.

The classic case involving television and governmental standards took place in February, 1959. The mayor of Chicago had appeared on television, acting in his official capacity. Lar Daly, a perennial office-seeker who was opposing the mayor in an election, claimed equal time. Rebuffed by the television station, Daly appealed to the FCC. By a vote of four to three, the FCC upheld Daly's claim, thus departing from its usual indifference to such claims by office-seekers from minor political parties or from no party at all.

The result of this ruling was a remarkable performance by Congress and the networks. Legislators and broadcasters, expressing surprise, indignation, and fear, protested that only the two major political parties should be protected by the equal-time provision. The frenzy was perhaps carried to an extreme by CBS, which informed Senator Hubert Humphrey that, although the national party conventions were more than a year away, CBS regarded him as a presidential candidate and feared that other aspirants would demand equal time if he were allowed to appear on its television program *Face the Nation*.[16]

[16] See William Costello, "That 'Ridiculous' Lar Daly FCC Ruling," *The New Republic*, Mar. 30, 1959; W. H. Lawrence, "Humphrey Is Ruled Candidate, Denied Free Air Time by C.B.S.," New York *Times*, July 17, 1959, pp. 1, 22; Richard F. Shepherd, "Humphrey Scores Equal-Time Curbs," New York *Times*, July 18, 1959, p. 29; "Stanton Appears on TV to Plead for Curb in Equal-Time Rule," New York *Times*, July 27, 1959, p. 39; Alistair Cooke, "Candidates Altogether too Equal," Manchester *Guardian Weekly*, July 23, 1959, p. 5; and John Lardner, "The Unlifted Finger," *New Yorker*, Aug. 8, 1959, pp. 72-77.

Sponsors, agencies, and producers of television shows are far more restrictive than the government has dared to be. Since the costs of producing a television program are extremely high, sponsors are often adamant about what they will pay for. With so great an outlay they want to make certain that their products will be presented in the best possible light and that no segment of the population will be alienated. As a result, television is devoted for the most part to the propagation of the commonplace, the inoffensive, and the unimportant. "Imagination, innovation, and vigor seldom swirl the surface of this pool of torpor. Why? Because nothing hurts nothing." [17]

In 1956, for example, Dale Wasserman prepared a television drama entitled "Fog." It dealt with the tragic effects of smog, effects which have included human fatalities in several communities. The script, after receiving rough treatment from prospective sponsors, was finally accepted for *Climax*. Wasserman was then required to do three complete revisions, after which he was told that the point he was trying to make—"that technology is not infallible and scientific progress is not always what it may seem"—had to be eliminated completely. When the play appeared on television, only half of the writer's original work was left in it.[18]

Writer Rod Serling faced similar difficulties in 1958 with his script "A Town Has Turned to Dust" for *Playhouse 90*. At the suggestion of CBS officials, Serling prepared a dramatization which in its major features re-created the case of Emmett Till, a fourteen-year-old Negro from Chicago who was killed in Mississippi evidently because he whistled at the wife of a white storekeeper. Serling's outline of the script was rejected by all but one one of the sponsors on the ground that Serling's treatment of the racial problem might adversely affect the sales of their products. Serling thereupon prepared a new script: the locale was transferred to "a small Southwestern town in the

[17] Roger Kennedy, "Programming Content and Quality," *Law and Contemporary Problems*, Autumn, 1957, p. 542.

[18] "Tempest and Talent," *Newsweek*, Dec. 3, 1956, p. 92.

1870s," and the protagonist became a romantic Mexican who was in love with the storekeeper's wife, but only "with the eyes." This left a Mexican as the object of the small town's wrath, but the script scrupulously avoided the use of any uncomplimentary epithets which might accelerate a Mexican's pulse. Thus was shaped a study of racial bigotry and murder which offended no one.[19]

A few months later, *Playhouse 90* again ran into trouble. It produced a play called "Judgment at Nuremberg" in which there were references to concentration camps and their crematories. At one point Claude Rains, portraying an American judge at the famous war crimes trials, asked a prisoner, "How in the name of God can you ask me to understand the extermination of men, women, and innocent children in ———?" Millions of viewers saw the actor's lips move but heard nothing. The missing words were "gas ovens," and the program's sponsor, the American Gas Association, had demanded that the sound be momentarily shut off to silence the two offensive words.[20]

Direct control by a television station or network is exercised by its censor, otherwise known as the director of continuity acceptance. Here are some of the changes made by an NBC official:

Changed (to something milder): "Just another Hollywood party girl playing easy-to-get at midnight suppers."

Banned: The showing of a toilet.

Cut (from Shakespeare's *Richard III*): The smothering of the little princes.

Cautioned against (after complaints from leather-jacket and blue-jean interests): Too many villains and too few heroes in leather jackets and blue jeans.

Allowed (by actual count over one year): Eight uses of the word "damn"; ten uses of the word "hell." [21]

[19] "Tale of a Script," *Time*, June 30, 1958, p. 36.

[20] *Time*, Apr. 27, 1959, p. 53.

[21] William Peters, "What You Can't See on TV," *Redbook Magazine*, July, 1957, p. 80. This article offers a splendid summary of the restraints upon television.

Sponsors, however, are the prime censors. Consider the experience of Leo Rosten, author (under the pseudonym of Leonard Q. Ross) of *The Education of Hyman Kaplan.* In 1956, the Fund for the Republic sponsored a contest called "The American Traditions Project." Thirteen prizes were awarded to individual Americans whose personal courage was judged to be in the best tradition of American life. The judges were General William F. Dean; the Most Reverend John J. Wright, Catholic bishop of Worcester, Massachusetts; the Right Reverend Henry Knox Sherrill, presiding bishop of the Protestant Episcopal Church; Henry L. Nunn, retired president of Nunn-Bush Shoe Company; Judge Sam Rosenman; Mildred McAfee Horton, former president of Wellesley College; and James Carey, president of the International Union of Electrical Workers. It was Mr. Rosten's job to call these incidents of courage to the attention of television producers. The stories were free and could be used in any way the producers saw fit.

Among the stories was that of A. Vincent Leun, an executive of Bethlehem Steel, who had learned that a sixty-year-old Bulgarian refugee named George Welkoff had been arrested in Hellertown, Pennsylvania, for violating an old law. The law said that no alien may own a dog. Welkoff did own a dog; he was fined $31.90, and the dog was taken from him to be killed. Unable to pay the fine, Welkoff himself was put in jail. Mr. Leun then came to his aid, paid the fine, and rescued the dog. "Leun received some threatening phone calls and some throaty warnings to keep his dirty nose out of other people's business. He responded by announcing that he intended to subsidize Welkoff to learn enough English to pass his citizenship exams." [22] Other prize-winning stories involved the efforts of an Akron, Ohio, waitress to combat police brutality; the struggle of a Berkley, Michigan, teen-ager against anti-Semitism; and the valor of a member of the Florida state legislature who spoke out in favor of integration.

What happened? All but two of the stories offered were turned down. "Of course, we can't use material which puts the

[22] Leo Rosten, "The Easy Chair," *Harper's Magazine,* Oct., 1957, p 17.

police in a bad light," one producer explained. Another producer was enthusiastic—up to a point: "These are wonderful! Really wonderful! They make you feel proud to be an American. Of course, television can't touch stories about segregation, you understand." A colleague was less pleased. "The thing that bothers us about all these stories is this: they're too *strong*." And the producer of a well-known show offered this capsule statement: "Unfortunately each of the cases involves some malpractice of justice which would meet with disapproval from our sponsor." [23]

Not all of television's troubles, of course, come from sponsors. As usual, powerful pressure groups are anxious to make sure that their own best interests are considered. The classic case of such anxiety occurred in Chicago in 1956, when station WGN-TV announced that it would show the film *Martin Luther* on December 21. On December 19 the station announced that it had decided to cancel the film, for WGN-TV did not want to contribute "to the development of any misunderstanding or ill will among persons of the Christian faith in the Chicago area."

The station had been swamped with telephone calls protesting the showing of *Martin Luther*. It was learned that an appointment had been made for December 14 for a discussion of the film between station officials and a representative of the Chancery Office of the Roman Catholic archdiocese of Chicago. But Monsignor E. M. Burke, chancellor of the Chicago archdiocese, said, "We have not made any representations to WGN-TV in any way. As far as the 1,800,000 Catholics here are concerned, it was an individual matter if they saw fit to protest against a film they consider historically inaccurate, if not downright insulting."

The Protestants of Chicago decried the cancellation of the film and accused the station of being "vulnerable to pressures which we are convinced, on the basis of our discussions with WGN, have been mobilized by the Roman Catholic Church to secure the banning of this film." They protested to the FCC that the television station had violated the terms of its license. But

[23] *Ibid.*, p. 20.

Martin Luther was not shown on December 21. A Milwaukee station presented it in March of the following year, and Chicagoans finally saw it on WBKB-TV on April 23.[24]

Many other pressure groups have made their feelings known as well:

> Among the varied interests that complained to one network over a relatively short period of time were: dentists over showing a dentist causing pain in patients, warehousemen because they felt that nine out of ten murders committed on the air involved a warehouse, gas companies on the use of gas ovens in suicide attempts, toupee manufacturers about jokes dealing with toupees, securities dealers over the presentation of crooked securities dealers, leather manufacturers on the presentation of juvenile delinquents in leather jackets, pharmacists over the presentation of incompetent pharmacists, dry cleaners on the dry cleaners shown on television who leave spots in a garment, and waitresses about television waitresses who are hardboiled and tough. One manufacturer complained in two different years over the seasonal use of Dickens' *Christmas Carol* because he felt that it was an attack on employers inasmuch as Scrooge was not an ideal employer. The mother of a son called Melvin objected to so many simpletons in television being called Melvin.[25]

Television has not been the only victim of such complaints. In the world of literature we have seen *Little Black Sambo* go down the drain because some Negroes found the book an affront to them. Mark Twain's *Huckleberry Finn* has been removed from some public schools because of the references to the faithful friend Jim as a "nigger." *The Merchant of Venice* has been removed from at least one list of required public school reading

[24] Peters, *op. cit.*, p. 80; "TV Station Yields to Catholic Pressure," *The Christian Century*, Jan. 2, 1957, p. 4; Robert E. A. Lee, "Censorship: a Case History," *The Christian Century*, Feb. 6, 1957. An admirable report concerning restrictions upon television is Charles Winick's *Taste and the Censor in Television* (New York, Fund for the Republic, 1959). See also Frank R. Pierson, "The Censorship of Television," part 1, *The New Republic*, Mar. 23, 1959; part 2, *ibid.*, Mar. 30, 1959; and William Styron, "If You Write for Television," *The New Republic*, Apr. 6, 1959.

[25] Winick, *op. cit.*, p. 14.

because Jewish leaders objected to Shylock, and *Oliver Twist* has suffered the same fate because of Fagin.[26] These same racial and religious groups, along with hundreds of other organizations representing people of various professions, businesses, religions, and national origins, are constantly alert to make sure that nothing appears on the screen, radio, or television which might in any way insult them. As one official of the Motion Picture Association of America has described the situation:

"If we paid serious attention to one tenth of one percent of what looks like legitimate protest, it would be utterly impossible for us to make any pictures at all, or have any kind of villain unless he were a native born, white, American citizen, without a job and without political, social, religious, or fraternal affiliation of any kind." [27]

Partly in despair at this welter of unofficial controls, and partly to stave off the possibility of tighter governmental control of program content, the National Association of Broadcasters in 1952 promulgated a television code. Subscription to the code is voluntary, but about two-thirds of America's television stations and the three networks adhere to it. Television programs are monitored by the NAB Code Review Board.

The television code, prepared during the industry's period of greatest prosperity, is unique in mass media regulation. It differs from the radio code in the extent to which it emphasizes the station's active responsibility toward its audience. It is also more detailed than the one for radio. Neither one uses language as moral as the movie code; neither provides for a fine for violations; neither is based on "compensating moral values." Although each motion picture must get a specific seal of acceptance, stations get a general seal of approval which they keep as long as they subscribe to the code.[28]

[26] For a humorous treatment of this problem, see William Corbin McGraw, "Pollyanna Rides Again," *The Saturday Review*, Mar. 22, 1958, pp. 37-38; see also *Time*, June 22, 1959. p. 2.

[27] Quoted by Leonard W. Doob, *Public Opinion and Propaganda* (New York, Holt, 1948), p. 506.

[28] Winick, *op. cit.*, p. 6.

The code bans excessive brutality, the sympathetic portrayal of criminals, the presentation of kidnaping in children's programs, profanity, obscenity, vulgarity, and the use of words derisive of race, color, creed, and nationality. It condemns improper costumes, the use of actors posing as members of the medical profession, a number of practices involving advertising, all attacks on religion, the use of "horror for its own sake," and suicide as a solution to the problems raised in a plot. In addition:

> Illicit sex relations are not [to be] presented as desirable or prevalent.
>
> Drunkenness and narcotic addiction are never [to be] presented as desirable or prevalent.
>
> The use of liquor in program content shall be de-emphasized. The consumption of liquor in American life, when not required by the plot or for proper characterization, shall not be shown.
>
> Respect is [to be] maintained for the sanctity of marriage and the value of the home. Divorce is not [to be] treated casually nor justified as a solution for marital problems.
>
> When religious rites are included in other than religious programs the rites are [to be] accurately presented and the ministers, priests and rabbis portrayed in their callings are [to be] vested with the dignity of their office and under no circumstances are to be held up to ridicule.[29]

The penalties for breaking the code are not extremely severe. (The offending station is asked to surrender its seal; if it does not comply, the seal is taken away.) But they are rigorously enforced, and upon the code's adoption there was an immediate, marked decline in the number of complaints to the FCC regarding the excesses of individual stations. By the middle of 1958, six subscribing stations had been asked to surrender their seals, and seven others were in the process of being suspended. Neither punishment is, in fact, particularly serious. Little publicity is given when a seal is withdrawn; the public hardly ever notices that a seal is no longer part of a station's advertising;

[29] National Association of Broadcasters, *The Television Code*, 5th ed. (Washington, NAB, 1959).

and the station continues to broadcast without interruption. Since punitive measures are thus relatively ineffective, the NAB places more emphasis upon informal persuasion than upon disciplinary action.

Television programing, the code states explicitly, is based on the principle that "it is the responsibility of television to bear constantly in mind that the audience is primarily a home audience, and consequently that television's relationship to the viewers is that between guest and host." This same principle, while not spelled out, is also implicit in the radio code. The guest-host analogy is, however, a dangerous one for the broadcasting industries. The relationship between guest and host is basically stimulating and intimate. The essence of the relationship is conversation, and there are no limits to what may be discussed. The guest-host relationship, at its best, is an exchange of thoughts and emotions in a situation which includes both gay good humor and high seriousness.

Television has thus set itself a difficult goal, and its actual performance has fallen far short of the ideal. Some observers argue that this failure is inevitable:

> Georg Simmel has pointed out that a conversation between two people may touch on a number of highly differentiated and intimate subjects; as soon as a third person is added, the conversation must be altered and compromised. As the group grows, the compromises become greater and the conversation more restricted. Subjects tend to center more and more around areas of common interest. By the time the group reaches the size of a mass audience, it can be expected that absolutely nothing would be of common interest, or what is of common interest would never suit those who happen to have more than superficial concern with it.[80]

This problem of communication, however, must not be allowed to shape the whole destiny of the broadcasting industries. No one can realistically expect television to produce only pro-

[80] Rolf B. Meyersohn, "Social Research in Television," in Bernard Rosenberg and David Manning White, *Mass Culture: the Popular Arts in America* (Glencoe, Ill., Free Press, 1957), p. 352.

grams of the intellectual and cultural caliber of *Omnibus.* Even some of the severest critics of television probably like to watch *Gunsmoke* and *The Millionaire,* at least occasionally. Nor would any viewer want an endless series of dramas dealing with what the mass media like to call "mature" subjects—a category that includes racial prejudice, drug addiction, and perversion. Nor would anyone enjoy for long the indiscriminate telecasting of four-letter words, obscene gestures, tragic endings, and nihilistic or at least pessimistic themes.

The critic of the contents of television must object, however, when sponsors, pressure groups, and the broadcasters themselves, either individually or through their code, attempt to exclude *all* "mature" subjects and *all* unpopular or unconventional ideas. Those who control television have set out deliberately to make that medium innocuous. The motive of their policy is money. Not desiring to alienate any segment of the public, however, they dress up their motive for public inspection and call it the desire to entertain.

Perhaps the most blatant case on record of what television means by entertainment was revealed in the 1959 scandals concerning the "fixing" of television quiz programs. Regardless of the specific guilt in this case, the philosophy that underlies nearly all television programing was at fault. The quiz shows were manipulated in order to make them more exciting, hence more popular, hence more profitable financially. The euphemism used for this deceitful process was the "stimulation" of the programs. As one participant explained, "A degree of deception is of considerable value in producing shows." [31] The philosophy of television entertainment, in short, is that to entertain, one must deliberately distort reality by distorting people and situations.

Art, in any of its forms, is never deceitful. It may, as in the theater, disguise the real identity of the performers, but only to reveal the absolute reality more clearly. How far from the standards of art does television fall when it must distort and yet claim

[31] New York *Times,* Oct. 10, 1959, p. 10.

that there has been no distortion! If television is a guest in our homes, we must say with the English dramatist Nicholas Rowe:

> Thou hast prevaricated with thy friend,
> By underhand contrivances undone me:
> And while my open nature trusted in thee,
> Thou hast stept in between me and my hopes,
> And ravish'd from me all my soul held dear.
> Thou hast betray'd me.[32]

This indictment cannot be limited to the "fixed" quiz programs. It applies to all attempts to impose false solutions upon the presentation of human problems. It applies to every deletion or substitution by a sponsor, fearful lest he appear to some viewers in an unfavorable light. It applies to every attempt to limit the variety of economic, political, religious, and social opinions which may be presented on television.

The conflict between the broadcasters' ideals and their actual motive in managing their enterprise creates all the trouble for television.[33] When financial gain is the dominant motive, it cannot tolerate any controversy which may endanger profits. The guest-host relationship—a relationship that accepts controversy because it demands truth and depth—must therefore be sacrificed. We can sympathize with sponsors, broadcasters, and the code as they face this dilemma, but sympathy must not lead us to condone television's shortcomings. Business, when it concerns itself merely with buying and selling in the market place, is not obligated to be a patron of culture. But when it uses a mass medium to vend its wares, it must respect the obligations which that medium has to values greater than the sale of soap, cigarettes, and automobiles.

Television, like radio, must use its power responsibly. It owes its very existence as a means of communication to the American people. The wave lengths of the air belong to the

[32] *Lady Jane Grey,* Act II:1, ll. 235 f.

[33] See Charles A. Siepmann, *Radio, Television and Society* (New York, Oxford, 1950), pp. 17-18.

people (as represented by the federal government), not to the networks or the individual stations. The broadcasting industries, therefore, bear the burden of a public trust which transcends their own welfare. Television must respect our rich cultural heritage and must acknowledge the importance of our present social, political, economic, and moral dilemmas. If sponsors want to use television for commercial purposes, they must support the full range of responsibilities that television bears.

We must be especially careful lest we gloss over the dangers of the television code. There are striking parallels between this code and its counterpart in the motion picture industry. Once again a mass medium is to become the expositor of Sunday School moralisms. Adults are to be protected from any presentation of the lives and problems of real men and women which might conceivably surprise a child. To the degree that television adheres to this code, it becomes another voice of outworn traditions, over-protectionism, legalism in morals, and unreality. We cannot, therefore look with equanimity upon the proposal of John C. Doerfer, former chairman of the FCC, that the code be used by the FCC as a standard of performance for license renewals.[34]

As a result of the quiz scandals and the revelations which followed in their train, television is threatened with cures from all sides. One of the most worthwhile and at the same time modest proposals is that submitted to President Eisenhower by Attorney General William P. Rogers on December 30, 1959. The Rogers report outlined some of the ways in which the Federal Communications Commission and the Federal Trade Commission could handle the problems that have emerged as a result of the scandals. It suggested the licensing of the networks, injunctions against stations employing false advertising, the option of milder sanctions than the refusal to renew licenses, and a federal law making "payola" a crime unless accompanied by a "sponsorship announcement." [35] These recommendations could be followed without endangering radio or television broadcasters'

[34] New York *Times,* Dec. 14, 1959.
[35] New York *Times,* Jan. 1, 1960, pp. 1, 10-12.

freedom of speech, and could correct and prevent some flagrant abuses.

As part of the general tendency to attribute to the mass media all of America's social and psychological ailments, some writers have asserted that television contributes to delinquency. All the old arguments about the harmful effects upon children of certain subjects and methods of presentation have been carried from paperbound books, comics, magazines, and movies into the realm of broadcasting. Walter Lippmann, complaining about the movies, comics, and television, has said that there cannot "be any real doubt that there is a close connection between the suddenness in the increase in sadistic crimes and the new vogue of sadism among the mass media of entertainment." [36] This argument suffers from the same inadequacies we have noted with regard to the comics.

As is true of the other media, not enough research has been done regarding the effects of television. It seems unlikely, however, that future investigations will seriously alter the recent findings of Hilde T. Himmelweit, A. N. Oppenheim, and Pamela Vince. In a thorough study of British television viewers and non-viewers in the 10-11 and 13-14 age brackets, these investigators destroyed most of the claims of those who have been hostile to television on the ground that it corrupts children. Regarding content, Himmelweit *et al.* found:

The world of television drama tends to be that of upper middle-class urban society. The occupations of people of this social level are depicted as worth-while, while manual work is presented as uninteresting. Television plays teach that self-confidence and toughness are needed to achieve success—goodness of character is not enough; that life is difficult, especially for women; that marriages are frequently unhappy, and parent-child relationships often strained. Events rarely turn

[36] Quoted by Leo Bogart, *The Age of Television, a Study of Viewing Habits and the Impact of Television on American Life,* 2nd ed. (New York, Ungar, 1958), p. 277.

out satisfactorily and virtue seldom brings happiness in its train. . . .[37]

Violence is an inevitable part of life, and good people often resort to it. For the adult observer a hackneyed view of life emerges, similar in many ways to that offered in films or in the theatre; for the child television may afford a glimpse of adult life which he would otherwise gain less often and only at a later age.

Such a glimpse may be unsettling, and it may be wise to postpone some adult programs until the children are in bed. Television violence, however, does not breed little criminals:

Television is unlikely to cause aggressive behaviour, although it could precipitate it in those few children who are emotionally disturbed.[38]

The history of censorship and control in England and America has now gone full circle. Censorship of the press started with prior restraints upon publication. Later these restraints were applied after the printed or spoken word had entered into social currency. Now, once again, restraints are imposed before publication or utterance. The important difference is that, while earlier restraints were fairly precise and everyone knew who would impose them, standards are now vague, and the controllers cannot be readily identified. Once we could point to the archbishop of Canterbury or to some other individual as the censor. After the Civil War, Anthony Comstock and his followers were equally well known. It was relatively easy to know what would offend these authorities. But what does the

[37] It should be noted that this is a content analysis of British, not American, television. While American television is more tough-minded than our movies, it seems to be hardly as pessimistic as its British counterpart. For hints of this see Bogart, *op. cit., passim;* and Dallas W. Smythe, "Reality as Presented by Television," *The Public Opinion Quarterly,* Summer, 1954.

[38] Hilde T. Himmelweit, A. N. Oppenheim, and Pamela Vince, *Television and the Child, an Empirical Study of the Effect of Television on the Young* (London, Oxford, 1958), pp. 17, 20. A good summary is to be found in "Children and Television," Manchester *Guardian Weekly,* Dec. 18, 1958, p. 16. Brief but wise observations are made in "The Young Viewer," London *Times Literary Supplement,* Dec. 12, 1958, p. 721.

television code mean when it speaks of "courtesy and good taste" in advertising?

We have developed a sophisticated form of control. We do not depend upon enforcement in television. Rather, in the best tradition of the cult of "togetherness," we emphasize good-natured cooperation. Centuries ago, bonfires were thought to be the proper remedy for a bad book, or even a bad author. We will have no more of that. Our remedy for the television script is the ever-so-gentle blue pencil or the sad smile indicating that the agency, or the sponsor, or the pressure group, would not really be pleased with this or that word, setting, characterization, or message. The methods of repression are different, but the results are the same.

And the consumers are themselves responsible for much of the squeamishness. The "pool of torpor" allows people to escape from their daily lives into a land where nothing happens to disturb the good-natured calm. The emotional and intellectual attitudes developed by this glorification of the insipid leaves them unprepared for joy or tragedy, but to the mesmerized viewers this is unimportant. Give them a beer and Ed Sullivan, and heaven itself could offer no more. Unfortunately for us all, the "Pat" Weavers and the Ed Murrows are rare in radio and television. Serious critics of the media are equally hard to find. The contented victims are everywhere. We can expect little improvement for a long time to come.

Chapter XII. An Unscientific Postscript

> If any in the neighborhood are enemies to their own welfare or families —prudently dispense your admonitions unto them. If there are any prayerless families, never leave off entreating and exhorting of them till you have persuaded them to set up the worship of God. . . . Whatever snare you see anyone in, be so kind as to tell him of his danger to be ensnared, and save him from it.
>
> Finally: if there be any base houses, which threaten to debauch and poison and confound the neighborhood, let your charity to your neighbors make you do all you can for the suppression of them.
>
> Cotton Mather, *Bonifacius*

A few pages have brought us a long way from our starting place. From the protectors of morals and manners in Republican Rome, we traveled to view the early practitioners of prior restraint in Great Britain. Sir Charles Sedley's antics on his Covent Garden balcony provided our first instance of censorship on the charge of obscenity. From that day in 1663 to the present, we have seen the history of censorship and control expand and unfold until it has touched many of the most famous authors and titles in world literature. Voltaire and Boccaccio, Shakespeare and Hemingway, *All Quiet on the Western Front, Jurgen, Antic Hay,* and *What I Believe*—all have appeared on the censors' blacklists. Chief among the suppressors was Anthony Comstock, but his many followers and successors have done their best to equal his achievement.

We considered at some length the legal developments from Justice Cockburn's decision in *Regina v. Hicklin* through Judge Learned Hand's qualms about the Hicklin rule and Judge John M. Woolsey's monumental decision in *United States v. Ulysses* to the cases of *Commonwealth v. Abraham A. Isenstadt, At-*

torney General v. The Book Named "Forever Amber," Roth v. United States, Alberts v. California, Kingsley Books, Inc. v. Brown, and the *Howl* case. Examining these cases closely, we discovered the basic principles involved in obscenity cases and, at the same time, some of the compelling reasons for opposing restraints upon materials which are, allegedly or in fact, obscene or pornographic. We then undertook an examination of the extra-legal restraint of books, magazines, motion pictures, and television shows, with special reference to the activities of local decent literature commissions, the National Office for Decent Literature, the Churchmen's Commission for Decent Publications, the administrators of the Motion Picture Production Code, the Legion of Decency, the National Association of Broadcasters, and the sponsors of radio and television programs.

The conclusion forced upon us by our study is a sharp indictment against all censorship and control. Legal restraints of books have more often than not been capricious; they have generally disregarded the literary and psychological merits of the works in question. The very concept of obscenity, and so the criteria by which a book is judged, is far too nebulous. And even if it could be precisely defined, obscenity, like blasphemy, is not an appropriate offense for punishment by law.

All the arguments about the deleterious effects of paperbound books, pulp magazines, and comic books are in large measure exaggerated. The glorification of violence, which is among the most dangerous features of these publications (and of motion pictures and television), is the *symptom* of a cultural malady, not the cause of it. Banning books and magazines will do little more, therefore, than give a false sense of well-being to some civic and religious leaders. Finally, to deprive adults of literature that may be a little too strong for some young people is to limit adult reading to the juvenile level. This is even more dangerous from the cultural standpoint than all the sadism the mass media can produce.

The Motion Picture Production Code institutionalized the juvenile and the mediocre, with the result that the motion picture industry is not a constructive force in American culture. It

systematically presents a false set of values, and thus makes life more difficult for those who let synthetic values be their guides. The Legion of Decency, as it attempts to enforce its moral theology on non-Catholics, often achieves the same destructive results. At the same time, the Legion, the NODL, and the Churchmen's Commission are busily enforcing legalistic moralisms which subvert the religious quest. And in the control of television by sponsors, agencies, and timorous producers, the sanctity of the cash register has almost entirely replaced that of human life profoundly experienced and believed. Art, religion, politics, and ethics all defer to the dollar in that hard-bitten world of make-believe.

We have examined the censors and controllers of the past and present, who they are and how they have exercised their power. We must now reach deeper and attempt to define briefly *why* these men feel obliged to censor or control. The question does not lend itself to a simple answer. The reasons behind people's actions are always complex and are usually only partially verbalized. And we cannot in good conscience follow Hollywood's example of creating stereotypes by suggesting that all comstocks are fashioned in the same mold.

Some official censors, for example, undoubtedly regard their work merely as a way of earning a living. They want to do their work well, but they are not zealous in performing their duties. Policemen who occasionally serve as censors may well consider their task of checking neighborhood newsstands an easy, unspectacular part of their job. Getting rid of "girlie" magazines may be, to some of them, just another routine, like arresting drivers who exceed the speed limit. To such censors, the imposition of restraints is not a matter of deep, personal concern. Were they relieved of these duties, they would experience no great sense of personal loss.

Other censors and controllers are motivated by a concern for social order. They seek to impose cultural restraints because they are convinced that "bad" words and "immoral" situations in the mass media will inspire "bad" and "immoral" actions, which

society must suppress for its own self-preservation. These censors and controllers are always engaged in protecting the status quo, in trying to prevent it from (in their view) degenerating. They believe that it is their personal responsibility to identify and combat the ideas and/or materials which threaten to deprave the society.

In their sense of mission, these comstocks are never truly objective, but they are accessible to reason. If the opponent of comstockery can lead them to re-examine their assumption that art leads to direct, imitative action, he may win them away from active support of censorship and control. Other things being equal, no reasonable man will persist in an activity when he suspects that the justifications for that activity may be false.

Some controllers, especially motion picture producers and sponsors of radio and television programs, exert their restrictive pressures because they are afraid of losing money. Their squeamishness is not moral. If they thought they could sell their products most effectively by glorifying nudism, they would put nudes in every television drama, musical, documentary, and commercial. As it is, sponsors believe that a simple, chummy, homey approach, interspersed with sadism and what Gilbert Seldes has called "the anatomy of misery," will sell more products than any other.[1] Arguments against control will have little weight with these people. Only if it can be shown that control will hurt their profits will they desist from trying to prevent, among other things, the mention of gas ovens and police brutality.

But not all censors and controllers are this rational—or, at least, not irrational. Some, for example, appear to regard comstockery as a means of gaining personal power or attention. Because they feel they do not receive ample respect from their peers, or because they want to rise above their surroundings, or merely because they crave to see their names in the newspaper, they turn to comstockery as a vehicle for steering the lives of

[1] See Murray Hausknecht, "The Mike in the Bosom," in Bernard Rosenberg and David Manning White, *Mass Culture: the Popular Arts in America* (Glencoe, Ill., Free Press, 1957), and Gilbert Seldes, "The Anatomy of Misery," in *The Public Arts* (New York, Simon and Schuster, 1956).

others or for riding into the public spotlight. Arguments against comstockery, to be effective, must suggest to these people that they have not found a really lasting or invulnerable means of acquiring power and/or publicity.

Yet none of these suggestions about the possible motives of the comstocks serves to account for the honestly zealous character of much censorship and control. Most censors and controllers appear too zealous to be interested in their work merely as a job, as a response to a set of theories about the effects of the mass media, or as a means of protecting a financial investment. Most of them seem too *honestly* zealous to be motivated wholly by a desire for power or fame. Indeed, the honest zeal of these comstocks often carries them beyond what we would consider the realm of normal reactions. So honestly devoted are they to their cause that, paradoxically, they lose their honesty in it. Their zeal, as they scrutinize a book, a magazine, a film, or a broadcast, leads them to read into the material meanings which simply are not there.

What usually happens is that the censors and controllers are so outraged, disgusted, and repelled by certain materials that their spontaneous reaction becomes an obsession. They *must* set out to destroy what offends them. It is a mission. Sometimes, as in the case of Anthony Comstock, it is the whole purpose of their lives.

The insights gained by psychology as a result of the pioneering work of Sigmund Freud enable us to understand better these zealous comstocks. Psychoanalysis has revealed, for example, that anxiety usually results from the promptings of impulses which our consciences find unacceptable, and that we attempt to ward off this anxiety by means of various "defense mechanisms." These mechanisms include *repression* (preventing the unacceptable impulses from becoming conscious), *projection* (attributing the impulses to another person), and *rationalization* (altering the thoughts and feelings connected with the impulses in order to make them more acceptable).[2]

[2] For good descriptions of these and other mechanisms, see Calvin S. Hall, *A Primer of Freudian Psychology* (New York, New American Library,

Repression is a common factor in all psychic life:

The girl who vehemently criticizes the taste in clothes of a friend often cannot consciously admit the real motive: "I wish I looked like her, and hate her because that man admires her." The mother who consciously maligns a school-teacher who justly punishes her son cannot endure the conscious thought: "My son was bad, not so good as the other children." The real motives of the "reformer" who consciously believes he is protecting others' morality and unconsciously enjoys a mass of obscene literature in the role of public censor are commonly recognized. . . .

The reason for these people's blindness to their own motives is in every case the same: awareness of the emotion associated with the unconscious thought is too excruciating to be endured, and the painful thought must therefore be excluded from conscious meditation.[3]

Some good examples of projection are offered by Calvin S. Hall:

A person who is afraid of his own aggressive and sexual impulses obtains some relief for his anxiety by attributing aggressiveness and sexuality to other people. They are the ones who are aggressive and sexual, not he. Likewise, a person who is afraid of his own conscience consoles himself with the thought that other people are responsible for bothering him, and that it is not his conscience.[4]

Karen Horney describes the sequence of projection and repression (in this case, repression of hostility):

[The individual] "pretends" that the destructive impulses come not from him but from someone or something outside. Logically the person on whom his own hostile impulses will be projected is the person against whom they are directed. The result is that this person now assumes formidable proportions in his mind, partly because such a person becomes endowed with the same quality of ruthlessness that his

1954), and Robert A. Harper, *Psychoanalysis and Psychotherapy: 36 Systems* (Englewood Cliffs, N.J., Prentice-Hall, 1959), esp. the glossary. A more detailed work is Ives Hendrick, *Facts and Theories of Psychoanalysis*, 3rd ed. (New York, Knopf, 1958).

[3] Hendrick, *op. cit.*, pp. 7-8.

[4] Hall, *op. cit.*, p. 89.

own repressed impulses have, partly because . . . the more defenseless one [feels] the greater the danger appears.

As a by-function the projection also serves the need of self-justification. It is not the individual himself who wants to cheat, to steal, to exploit, to humiliate, but the others want to do such things to him.[5]

For "destructive" and "hostile," read "sexual"; for "person," read "material." A familiar comstock then begins to emerge.

Rationalization is an especially common defense mechanism:

A person who gives a lot of money to charity may think he is doing it out of the kindness of his heart when he is really motivated by a desire to show off or by a guilty conscience. . . .

Obviously one cannot be conscious of projecting or rationalizing, otherwise the mechanisms would not alleviate anxiety. This is true of all the defenses of the ego; they must operate unconsciously in order to be effective in reducing anxiety.[6]

In psychoanalytic terms, the superego is that part of the personality which sets up norms for the individual to follow. The superego is subdivided into two aspects: *conscience,* a nay-saying inner voice, and *ego-ideal,* an inner advocate of affirmative values.[7] Ideally these should be in balance: whenever our conscience bars us from acknowledging or acting on a forbidden emotion, the energy that has been aroused should be redirected by our ego-ideal and released through an acceptable—or even admirable—activity. But this healthy release of "bad" emotions is denied to the zealous comstock. Temptation and tension increase, and he retaliates by lashing out at his own emotions—but indirectly, and without admitting to himself what he is doing.

Various types of immorality or daring have a fascination which these comstocks find difficult to escape. This fascination is dangerous to their psychic stability: it threatens their whole way

[5] Karen Horney, *The Neurotic Personality of Our Time* (New York, Norton, 1937), p. 70.

[6] Hall, *op. cit.,* p. 90.

[7] *Ibid.,* p. 31.

of life as moral men and women in their communities. For this reason, and to ward off the sting of their consciences, they must suppress any favorable response to the "objectionable" material; but as long as the stimuli are available, they are threatened. Their ego-ideals are too weak to accept the "bad" impulses, which may in their case be exceptionally strong, and redirect them into valuable, compensating enterprises. Their only solution is to eliminate the sources of the threat altogether. Then their consciences can subside, while their ego-ideals gloat with the Pharisee: "I thank thee that I am not like other men, extortioners, unjust, adulterers . . ." (Luke 18:11; *RSV*).

It seems reasonable to believe that Anthony Comstock's activities developed out of just such an ambivalent attitude toward the materials, the people, and the ideas he was attacking. In 1877, for example, Comstock attended a meeting of Ezra Heywood's free-love organization in Boston:

> I looked over the audience of about 250 men and boys. I could see lust in every face. After a little, the wife of the president [Heywood] (the person I was after) took the stand, and delivered the foulest address I ever heard. She seemed lost to all shame. The audience cheered and applauded. It was too vile; I had to go out.

Comstock reacted vigorously against a situation which most of those present evidently found enjoyable and which others, having a different point of view, could at least regard without great mental disturbance. Comstock's desire to flee, on the excuse that he found the occasion repulsive, was undoubtedly a defense mechanism to snap off, before it could become conscious, his temptation to join in the cheers and applause.[8]

[8] This interpretation receives support from an observation made by Otto Fenichel, *The Psychoanalytic Theory of Neurosis* (New York, Norton, 1945), p. 143: "The warded-off instincts exert a constant pressure in the direction toward motility. Deprived of their possibility for direct discharge, they use any opportunity for indirect discharge, displacing their energy to any other impulse that is associatively connected with them, increasing the intensity of this substitute impulse or even changing the quality of the affect connected with it."

But flight did not soothe his conscience:

> Every manly instinct cried out against my cowardly turning my back on this horde of lusters. I determined to try. I resolved that one man in America at least should enter a protest. . . . I returned to the hall. This chieftain's wife continued her offensive tirade against common decency. Occasionally she referred to "that Comstock." Her husband presided with great self-complacency. You would have thought he was the champion of some majestic cause instead of a mob of free-lusters. I sat down again in the audience. The stream of filth continued until it seemed to me I could not sit a moment longer.[9]

By attacking "filth," Comstock could reassure himself that he was not as "other men." But this image of himself as a virtuous man was shaky: it depended upon a continual, vigorous reassertion of his preternatural virtue.

This compelling need for reassurance led him to undeniable excesses. He evinced more than a love of statistical exactitude when, in one of his press releases describing his accomplishments and tabulating the figures for obscene books and pictures destroyed and stereotype plates smashed, he included the item: *"Expressman dead. . . ."*[10] The man whose demise Comstock credited to his own moral account was a transporter of obscene materials who died shortly after Comstock began to turn his energies against him. In the death of the expressman, Comstock appears to have celebrated the death—alas, temporary—of his own unacceptable drives.

Because censorship and control attract such fanatics, they present the liberal with a long-range challenge. The comstocks are not merely people with intellectual theories who might be convinced by more persuasive theories; nor are they pragmatists who will be guided by the balance of power among pressure groups. Many of them are so emotionally involved in the condemnation of what they find objectionable that they find rational arguments irrelevant. They *must* suppress what is offensive in

[9] Quoted by Heywood Broun and Margaret Leech, *Anthony Comstock, Roundsman of the Lord* (New York, Boni, 1927), pp. 172-73.

[10] *Ibid.*, p. 93.

order to stabilize their own tremulous values and consciences. Panic rules them, and they cannot be calmed by discussions of legal rights, literary integrity, or artistic merit.

The comstocks owe most of their power in their communities to public opinion. Their cleanup crusades can be effective because the public supports their activities. Indeed, without the expectation of such support, many comstocks would retire from their pursuit of the obscene, the suggestive, and the unconventional. The honestly zealous comstock must have massive and favorable publicity to help him forget that he himself was ever tempted. Public support puts his crusade in a new light: it allows him to speak as if he had no personal involvement in the material he is attacking, but is acting only in the public interest. His rationalizations are validated, and he can escape a conscious awareness of his ambivalent feelings in attacking what he secretly finds fascinating. If public support should weaken, his own precarious self-image might collapse.

The religious conception of the moral laws of God has often taken the place of social norms as a justification for comstockery, but this conception has recently lost much of its power, especially in modern Protestantism. It is no longer a strong crutch. Since the censors and controllers lack this ultimate assurance, they are wary and vulnerable: they must yield as their supporters fall away. But this in turn requires a level of public maturity that will be extremely difficult to achieve.

Legal censorship is on the wane—for the moment, at least. But the controllers are increasingly active and widespread. Governmental restraint of culture is being replaced by a smiling, very genteel dictatorship of private citizens who seek to do what the law cannot do. So long as there is no cautious, sensitive public attitude toward control of the mass media, the comstocks can expect a considerable degree of success. The implications of this situation for our cultural, political, social, and economic life are ominous.

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Index